**IN THE HIGH COURT OF SOUTH AFRICA**

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

**CASE NUMBER: 3535/2013**

**DATE HEARD: 13/08/2018-16/08/2018**

**DATE DELIVERED: 02/10 /2018**

In the matter between:

| | |
|---|---|
| **TRYZONE FOURTEEN (PTY) LTD** | **PLAINTIFF** |

and

| | |
|---|---|
| **PETER GEORGE BATCHELOR N.O** | **FIRST DEFENDANT** |
| **ANDREW JOHN BATCHELOR N.O** | **SECOND DEFENDANT** |
| **ROBIN OWEN JEFFERSON N.O** | **THIRD DEFENDANT** |
| **ROSEMARY ANN BATCHELOR N.O** | **FOURTH DEFENDANT** |
| **MICHAEL JAMES ORGANISATION** | **FIFTH DEFENDANT** |
| **ARTHUR J MARRINER** | **SIXTH DEFENDANT** |
| **ALSAK (PTY) LTD** | **SEVENTH DEFENDANT** |

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**JUDGMENT**

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**NAIDU AJ:-**

INTRODUCTION:

[1] This is an action in which the Plaintiff seeks restitutive relief from the Defendants arising out of a failed purchase transaction in respect of an immovable property. The Plaintiff claims restitution in the amount of R835 740.00. It is further common cause that the Plaintiff seeks no relief from the Third Defendant herein.

[2] It is trite that the matter initially proceeded by way of application, whereafter an order was made by Alkema J that the matter proceed by way of trial, with the filing of pleadings.

BACKGROUND:

[3] The following facts are common cause. The property that makes up the factual matrix of the dispute between the parties is identified as, ''Unit 1, Manor Hastings, 13 2nd Avenue Walmer, Port Elizabeth,'' (''the Property'').

[4] The Plaintiff company was represented at all material times by its sole director, one *Dr Dimitri Coutsouridis* (hereinafter *''Dr Coutsouridis''*), a local businessman. The First to the Fourth Defendants are trustees of the Unit 1 Manor Hastings Trust (''the Trust''), the Fifth Defendant was the auctioneer that attended to the sale of the property on auction. The Sixth Defendant was the Trust's duly appointed agent that had been tasked by the Trust to sell the property. The Seventh Defendant was a juristic entity of which the Sixth Defendant was the sole member, and in fact had been deregistered during March 2013.

[5] It is common cause that on or during February 2013, Dr *Coutsouridis* was drawn to an advertisement in the local print media wherein which an immovable property,

described as ''Unit 1, Manor Hastings, 13 2nd Avenue Walmer, Port Elizabeth,'' (''the Property''), was advertised for sale. The sale of the property on auction was advertised to be held on the 12th March 2013 at 11h00.

[6] A copy of the advertisement is set out hereunder:

| AUCTION DETAILS | |
|---|---|
| AUCTION DATE | Tuesday,12 March 2013 @11h00 |
| AUCTION VENUE | On Site: Unit 1, Manor Hastings, 13 2nd Avenue Walmer, Port Elizabeth |
| VIEWING | By Appointment Only |

| GENERAL INFORMATION | |
|---|---|
| PROPERTY TYPE | Sectional Title property |
| SCHEME NAME. | SS MANOR HASTINGS |
| SCHEME NO. | 61/1982 |
| UNIT NO & ERF NO. | UNIT 1 SITUATED ON ERF 3068, WALMER |
| SIZE OF UNIT | 1807m² |
| TITLE DEED NUMBER | ST2967/1994 |
| PHYSICAL ADDRESS | **UNIT 1 SS MANOR HASTINGS, 13 2ND AVENUE, WALMER** |
| MANAGING AGENT | JACK ALLERS |
| ANNUAL RATES | R46,200 |
| LEVIES & INSURANCE PER ANNUM | **R52,080 PAID BY THE TENANT (ADMIRALS)** |

**PROPERTY NOTES**

- DOUBLE STOREY PRIME COMMERCIAL PROPERTY WITH HIGH EXPOSURE ACCESS AND VISIBILITY. ZONED BUS 2.
- CURRENTLY BEING LET WITH LEASES IN PLACE TO THE FOLLOWING:

| | | |
|---|---|---|
| **ADMIRALS** | LEASE PERIOD **1/09/2012 – 31/08/2017** | |
| | MONTHLY RENTAL INCL VAT | R45,000 |
| | MONTHLY LEVY AND INSURANCE | R 4,340 |
| | MONTHLY WATER & SEWERAGE | R 2,660 |
| **ZTE** | LEASE PERIOD **1/11/2012 – 31/10/2013** | |
| | MONTHLY RENTAL INCL VAT | R34,000 |

**TERMS AND CONDITIONS**

10% DEPOSIT PLUS 10 % AUCTIONEERS COMMISSION PLUS R1,140 DOUCMENTATION FEE ON THE FALL OF THE, BALANCE ON TRANSFER.

**FICA DOCUMENTS REQUIRED FOR AUCTION REGISTRATION**

| CONTACT DETAILS | |
|---|---|
| Name | ASHTON GALPIN/ROLENE KOTZE |
| Telephone | (041) 487 3957 |
| Email | rolene@michaeljames.co.za |

[7] *Dr Coutsouridis* being interested to purchase the property made inquiries with the Fifth Defendant and sought further information pertaining to the property on the 25th

February 2013 with the Fifth Defendant responding to such request on the 28th February 2013.

[8] On the 05th March 2013, *Dr Coutsouridis* attended upon an inspection of the property and was accompanied by a representative of the Fifth Defendant, one Mr *Ashton Galpin.* At the inspection, *Dr Coutsouridis* was provided with a tour of the premises, with an inspection being conducted on the ground floor as well as the first floor of the property. *Dr Coutsouridis* was specifically advised by Mr *Galpin,* that the verandah on the first floor, formed part of the property to be sold on auction. He was further advised by Mr *Galpin* that the Trust held deposits in respect of the leases of the property and which would be paid over to the purchaser of the property.

[9] On the 12th March 2013, *Dr Coutsouridis* attended upon the auction, which was being held on the property to be sold. As a prospective buyer, it was incumbent upon *Dr Coutsouridis* to sign documentation relating to the sale. In this regard he attended to signing a document entitled *''Rules of Auction and Conditions of Sale for Immovable Property'',* and a document entitled *''Rules of Auction.''*

[10] It is then common cause that Dr *Coutsouridis* bid R3 900 000-00 million for the property, which bid was the highest, and was duly accepted as being successful by the Fifth Defendant. The bid amount excluded the auctioneer's commission and the Vat thereon.

[11] On the 14th March 2013, the Seventh Defendant addressed correspondence to the Fifth Defendant advising that the Trust had accepted the auction price and further requested that the deposit paid be transferred into the Unit 1 Manor Hastings Trust

Bank account. A trustee of the Trust one *R Batchelor* had signed the Conditions of Sale on behalf of the Trust in acceptance of the offer to purchase the property.

[12] On the 15th March 2013, *Dr Coutsouridis* received an email from one *''Rolene''*, an employee of the Fifth Defendant, congratulating him on the purchase of the property, and attached various documentation that he had requested, which included:

1. Signed Conditions of Sale;

2. Acceptance Letter from the Seller;

3. Copy of the Rates Account;

4. Copy of the Water Account;

5. Copy of Deposit Invoice;

6. Confirmation that the managing agent of the property was the *''Jack Allers Group'';*

7. That the body corporate would demarcate 14 parking bays undercover as was requested by *Dr Coutsouridis.*

[13] It is apposite that the Plaintiff then paid to the Fifth Defendant the sum of R835 740-00, made up as follows:

(i) A deposit equal to 10% of the purchase price being the sum of R390 000-00;

(ii) The costs of the relevant administrative documentation in the sum of R1140-00;

(iii) The Fifth Defendant's commission in the sum 10% of the purchase price, inclusive of VAT thereon, being the sum of R444 600-00.

[14] Pursuant to the payment of the R835 740-00, *Dr Coutsouridis*, via his attorneys addressed correspondence to the Sixth Defendant expressing his increasing concern regarding the validity of the lease agreement between the Trust and Vaidro 120 CC, being ''Admirals'', as he had been advised by *Mr Shamley* of ''Admirals'' that the lease agreement with the Trust was unenforceable due to the non-compliance with the suspensive conditions contained in the lease agreement. The Plaintiff further requested proof of all payments received by the Trust from the lessees, and expressed the concern that the ''Admirals'' lease was a principal lease and that the Plaintiff had relied on such lease being in place when the property had been purchased. The Plaintiff's attorneys requested the information on various occasions from the Sixth Defendant.

[15] On the 13th May 2013, the Plaintiff's attorneys finally received a reply from attorney C.R Knoesen, submitting that the purchaser was not entitled to plead misrepresentation as he had failed to carry out a due diligence of the property. In response to the correspondence the Plaintiff's attorney advised the Sixth Defendant it still requested the information it had previously requested and threatened to file an application in terms of the provisions of the Promotion of Access to Information Act 2 of 2000.

[16] The application in terms of the Promotion of Access to Information Act 2 of 2000 was subsequently filed by the Plaintiff. The following documentation *inter alia* were requested:

*''1. Inasfar as the agreement of lease between the Trustees of the Unit 1 Manor Hastings Trust and Vaidro 120 CC dated August 2012 (''the Admirals lease'') is concerned:*

*1.1 The approval of the loan by Business Partners referred to in clause 9.1 of annexure ''A'' to the Admirals Lease.*

*1.2 The proof of payment of the deposit in the sum of R52 000-00 by the Lessee to the Lessor referred to in clause 9.2 of annexure ''A'' to the Admirals Lease.*

*1.3 The confirmation or waiver of the Lessee of the condition referred to in clause 9.3 of annexure ''A'' of the Admirals Lease.*

*1.4 All invoices and proof of payments relating to the fixing of the roof referred to in clause 9.4 of annexure ''A'' of the Admirals Lease.*

*1.5 The proof of payment of the amount of R27 500-00 by the Lessee to the Lessor for the use of the premises from 16 August 2012 to 31 August 2012 referred to in clause 9.4 of the Admirals Lease.*

*1.6 All invoices of the Lessor to the Lessee pertaining to amounts due by the Lessee in terms of the Admirals Lease from 1 September 2012 to date.*

*1.7 All statements of the Lessor to the Lessee pertaining to Admirals lease from 1 September 2012 to date.*

*1.8 All proof of payments of amounts paid by the Lessee to the Lessor pertaining to Admirals Lease from 1 September 2012 to date*

*1.9 All correspondence between the Lessor and the Lessee pertaining to the Admirals Lease from 1 September 2012 to date.*

*1.10 All bank statements pertaining to the deposit that the Lessor holds in terms of the Admirals Lease.''*

[17] The Plaintiff further requested similar information pertaining to the company known as ''ZTE'', the second lessee occupying the property, as well as the relevant bank statements pertaining to the deposit paid by the Plaintiff in respect of the agreement of sale with the Trust for the property.

[18] It is trite that a plethora of correspondence were exchanged between the legal representatives for the Plaintiff and the Trust, in addition to various meetings held between the parties legal representatives in an effort to resolve the issues in dispute, in particular the documentation requested by the Plaintiff. Regrettably it appeared that the parties were unable to reconcile their differences.

[19] On the 26th August 2013, the Trust's attorneys addressed correspondence to the Plaintiff's attorney advising that should the Plaintiff not furnish the transferring attorney CR Knoesen with the relevant guarantees before the close of business on the 30th August 2013, that their client would reserve its right to cancel the agreement.

[20] In response to such correspondence the Plaintiff's attorney filed a reply on the 27th August 2013 to the Trust's attorneys and reiterated the Plaintiff's concern regarding the validity of the lease agreement with ''Admirals'', the properties anchor tenant. Furthermore it was concern was expressed of the fact that the Plaintiff had failed to receive occupation of the property in terms of the agreement of sale, and had not received any of the deposits that had been paid by the existing tenants of the property.

It was further reiterated that the information and documentation requested in terms of the application of Act 2 of 2000 had yet to be provided. It was further submitted that the Trust had failed to disclose substantial expenses that would have to be incurred regarding the property.

[21] On the 17th September 2013, the Trust's attorneys advised the Plaintiff's attorneys that the client had decided to cancel the agreement as the Plaintiff had failed to provide the necessary guarantee timeously. In response thereto, the Plaintiff's attorney disputed the validity of the Trust's cancellation of the agreement and claimed that the Trust had in fact repudiated the agreement and consequently the Plaintiff cancelled the agreement. The Plaintiff further demanded repayment of the sum of R864 630-00, being the inclusive amount of R835 740-00 that was paid by the Plaintiff on the 14th March 2013 and the amount of R28 890-00 that was paid to the transferring attorneys C.R Knoesen on the 17th March 2013.

[22] The above sequence of events finally materialized into an application filed by the Plaintiff which subsequently morphed into the present action before me.

## THE PLAINTIFF'S CASE:

[23] The Plaintiff submits that pursuant to the payment of the deposit and auctioneers commission and through the effluxion of time, it is submitted and pleaded on behalf of the Plaintiff that *Dr Coutsouridis* became aware of the following:

(i) That the Trust was not in receipt of monthly rentals from ''Admirals'', and that ''Admirals'' had in fact not made rental payments for the month of October 2012, had only paid an amount of R1 700-00 for the month of November 2012 and was in default of its further rental obligations thereafter;

(ii) Dr *Coutsouridis* further discovered that the verandah that he had been advised by *Mr Galpin*, formed part of the property, did not in fact form part of the property;

(iii) That the Trust did not hold rental deposits from the tenants of the property.

[24] It is further pleaded on behalf of the Plaintiff that upon perusal of the lease agreement entered into between the Trust and Vaidro 120 CC, the company operating ‘’Admirals’’, the following was apparent namely:

(i) The Lessee had to obtain approval of a loan from Business Partners;

(ii) That the Lessee had to make payment of a deposit in the sum of R52 000-00;

(iii) That the Trust was obligated to repair the roof of the premises which had been leaking.

The above conditions had all not been fulfilled.

[25] The Plaintiff further discovered that the Trust had been subject to an adverse arbitration order made against it by the body corporate of the scheme, which had found that the Trust, as owner of the property, was liable:

(i) To remove an unauthorized façade;

(ii) To replace the roof on a refuse hut;

(iii) To replace the enclosure on the second floor with more durable materials;

(iv) To pay the costs of the laying of further electrical cabling.

[26] It is pleaded on behalf of the Plaintiff that had the Plaintiff been aware of the above information, it would not have bid to purchase the property for the sum of R3 900 000-00, or at all, and that it had been induced to purchase the property by the misrepresentations conveyed to it and the fraudulent non-disclosures.

[27] As result of the fraudulent misrepresentations the Plaintiff submits that it is entitled to restitution of the amount of R835 630-00 from the Defendants.

THE FIRST TO THE FOURTH DEFENDANTS DEFENCE:

[28] It is pleaded on behalf of the trustees of the Trust that it is denied that the representations made by the Fifth Defendant to *Dr Coutsouridis* regarding the rental deposits that were supposed to have been held by the Trust and which in fact were not held, were false. It is specifically pleaded that the only representation made on behalf of the Trust in relation to the ‘’Admirals’’ lease, prior to the auction, was the advertisement that appeared in the newspaper.

[29] The trustees submit in their pleadings that the ‘’Admirals’’ lease was at the time of the auction in arrears in respect of its rental obligations, however *Mr Shamley,* the owner of ‘’Admirals’’, had taken financial steps to settle the arrears.

[30] It was specifically pleaded that the Trust denied that any fraudulent misrepresentations had been made by anyone in relation to the admirals lease either prior to the auction or anytime thereafter, and that the Plaintiff had been well aware of the difficulties with the ''Admirals'' lease shortly after the auction but before the lawful cancellation of the agreement by the Trust.

[31] The Trustees in their pleadings further deny having misled the Plaintiff regarding the inclusion of the veranda.

[32] Regarding the issue of the Trusts obligations in respect of the lease agreement entered into between it and Vaidro 120 CC being ''Admirals'', it is pleaded specifically that the Trust denied that it or its agent had any legal duty to make any factual disclosures to the Plaintiff in respect of the reciprocal duties ensconced in its lease agreement with Vaidro 120 CC.

[33] The Trust admits in its pleadings that it was well aware that the roof in the kitchen area was leaking, but it did however provide Vaidro 120 CC with a written undertaking to repair the leak. It is further pleaded regarding the issue of the leaking roof that *Dr Coutsouridis* had inspected the property prior to the auction and had never enquired about the state of the roof, and that consequently no fraudulent misrepresentations had been made to him in this regard. It is further pleaded that the *''Voetstoots Clause''* in the agreement has application in the context and in any event the leaking roof was immaterial to the agreement concluded between the parties and did not entitle the Plaintiff to resile from the agreement.

[34] In respect of the arbitration award against it, the Trust avers in essence that such obligations were attached to it, as a juristic entity and accordingly was not transferrable to the Plaintiff, and that it would have honoured such obligation.

THE FIFTH DEFENDANT'S DEFENCE:

[35] The Fifth Defendant in essence pleads that it acted on the instructions of the Sixth Defendant in the preparation of the advertisement in the newspaper, and that it was indeed the Sixth Defendant that had provided the necessary information for such information leaflet.

[36] The Fifth Defendant specifically pleaded *inter alia* that the Plaintiff had signed the ''Conditions of Sale'', which stipulated that the purchaser was liable for the auctioneer's commission amounting to 10% of the purchase price in addition to VAT thereon.

[37] It is further pleaded that in terms of the provisions of the signed ''Conditions of Sale'', it was stipulated that the auctioneer would not be held personally liable in consequence of any representation made by him with regards to the sale of the property.

[38] It was further pleaded on behalf of the Fifth Defendant that in terms of the ''Rules of Auction'' that had been signed on behalf of the Plaintiff by *Dr Coutsouridis,* and specifically having regard to clause 2.1 thereof which reads:

*''The purchaser shall be liable for and pay, in addition to the amount payable in terms of the conditions of sale, auctioneer's commission of ten percent of his bid, plus VAT*

*thereon, which commission shall be payable into the trust account of the auctioneer immediately upon the seller signing the conditions of sale as acceptance of the purchaser's bid.''*

[39]The Fifth Defendant accordingly submits that the Plaintiff is disentitled to reclaim the commission amount paid to it.

<u>THE SIXTH DEFENDANT'S DEFENCE:</u>

[40] The Sixth Defendant admits to having instructed the Fifth Defendant to advertise to the general public the sale of the property. It was specifically pleaded that the Sixth and Seventh Defendants had been acting on behalf of the Trust in this regard.

[41] The Sixth Defendant specifically pleaded that upon request from the Plaintiff for information regarding the property, directed at the Fifth Defendant, that he himself provided such information to the Fifth Defendant to convey to the Plaintiff. It is common cause that the information confirmed in this regard related to a request made by one *Tahlita Zwiegelaar*, an employee of the Plaintiff, who requested information pertaining to the property, prior to the auction date. An email was addressed to *Rolene,* an employee of the Fifth Defendant on the 25th February 2013, requesting: *''the current leases of the property, Rates and taxes, Plans (if exist) and Insurance.''*

[42] It is further common cause that on the 28th February 2013 *Tahlita Zwiegelaar*, advised *Dr Coutsouridis* via email that she had been provided with certain information

that had been requested from *Mr Ashton Galpin* an employee of the Fifth Defendant. The information was provided by *Mr Galpin* telephonically and confirmed the rates and taxes and the confirmed *inter alia* the rental income of the property.

[43] The Sixth Defendant pleaded that he bore no knowledge as to the representations made by the Fifth Defendant to the Plaintiff on the 12th March 2013, in the context of the representation made by *Mr Galpin* on behalf of the Fifth Defendant that the Trust held the necessary rental deposits for the property, and that same would be paid over to the prospective purchaser. The Sixth Defendant specifically admits that he was aware that as at the date of the 12th March 2013, (being the date of the auction), ''Admirals'' had been in arrears with its rental obligations, and that the Trust did not in fact not hold the relevant rental deposits from the tenants of the property.

[44] The Sixth and Seventh Defendants further deny that they were under any legal duty to disclose to the Plaintiff the issues relating to the lease agreement between the Trust and Vaidro 120 CC, being ''Admirals''. The Sixth Defendant specifically denies that such information relating to the lease agreement was fraudulently withheld from the Plaintiff.

[45] The Sixth and Seventh Defendants further admit that the roof of the property had been leaking, and were aware of same at the time that the property was sold on auction, but pleads that the Trust had provided Vaidro 120 CC with a written undertaking to repair same. It is also pleaded that *Dr Coutsouridis* never enquired about the roof during his inspection of the property and further that the leaking roof is covered by and rendered non-actionable by the ‘*'Voetstoots clause''* in terms of the sale agreement entered into between the Plaintiff and the Trust.

[46] Regarding the issue of the arbitration award made against the Trust, the Sixth and Seventh Defendants plead that such obligations attached only to the Trust and not to any successors in title to the property.

THE EVIDENCE ON BEHALF OF THE PLAINTIFF:

[47] *Dr Dimitri Coutsouridis* testified on behalf of the Plaintiff. *Dr Coutsouridis* confirmed that he was the sole director of the Plaintiff Company.

[48] He further confirmed that during February 2013, he was drawn to an advert in the local newspaper advertising the sale of a property on auction. He requested his assistant *Tahlita Swiegelaar* to obtain further information regarding the property from the Fifth Defendant. It is common cause that the request was made to *Rolene* an employee of the Fifth Defendant on the 25th February 2013. The information requested was provided on the 28th February 2013. The information included confirmation of the monthly rental income of the tenants in the property. Dr *Coutsouridis t*hen utilized the information he had at hand to work out a ‘’desk top’’ calculation as to the feasible purchase price he could bid for the property.

[49] On the 05th March 2013, Dr *Coutsouridis* attended upon the property and made an on-site inspection. He was accompanied by *Mr Ashton Galpin,* a representative of the Fifth Defendant who, during such inspection, confirmed to him that the veranda formed part of the property to be purchased and further confirmed to him that the Trust was in possession of the rental deposits from the tenants.

[50] *Dr Coutsouridis* confirmed that he attended the auction on the 12th March 2013. He confirmed having signed the 'Rules of Auction'' but had not been given a proper opportunity to study the contents thereof adequately. He had asked *Rolene,* an employee of the Fifth Defendant, who was present at the auction and was assisting in the facilitation of the auction if ''everything was in order'' and if there was ''anything funny'' contained in the ''Rules of Auction'', he was assured everything was fine. It is then common cause that his bid of R 3 900 000-00 was the highest bid and was accepted by the Fifth Defendant.

[51] *Dr Coutsouridis* confirms that two days later, he was advised that his bid was successful, and that the Trust had accepted his offer. On or about the 13th March 2013, he received a Tax Invoice from the Fifth Defendant setting out the sum the Plaintiff had to pay, being R835 740-00. *Dr Coutsouridis* confirmed that he effected an electronic transfer of the aforesaid amount into the bank account of the Fifth Defendant.

[52] Pursuant to the payment of the R835 740-00, *Dr Coutsouridis* became aware of various issues relating to the property which caused him some consternation. He discovered that a possibility existed that the owner of ''Admirals'', namely one *Mr Shamley* considered ''Admirals'' not bound to the lease agreement with the Trust, due to the non-fulfilment of certain suspensive conditions contained in such agreement, one of which being the suspensive condition related to the Trust having to repair the leaking roof on the property. *Dr Coutsouridis* was unaware of such leak prior to his proposal to purchase the property.

[53] He further discovered that ''Admirals'' were in financial difficulties and were in arrears with its rental payments. He further discovered, contrary to *Mr Galpin's* confirmation, that the Trust did in fact not hold any rental deposits for the tenants.

[54] *Dr Coutsouridis* further also discovered that there had been an arbitration award made against the Trust in a matter between it and the Body Corporate of the Sectional Title Scheme of the property. In terms of the award, the Trust as owner of the property was directed to effect various repairs and renovations to the property.

[55] *Dr Coutsouridis* confirmed that had he been appraised of the fact that the anchor tenant ''Admirals'' had been in arrears and that *Mr Shamley* had in fact advised the Sixth Respondent in January 2013, he intended to close the doors of the business due to financial difficulties, he would not have bought the property.

[56] Having regard to all of the information that he discovered pursuant to purchase of the property, *Dr Coutsouridis* confirmed that he would not have purchased the property.

[57] During examination in chief, *Dr Coutsouridis,* was presented with a correspondence in the form of an email from the Sixth Defendant to the First, Second and Fourth Defendants, dated the 12th March 2013, being the date of the auction. The email reads as follows:

> *''Hi all*
>
> *There were about twenty people at the auction this morning and in the end there were three serious buyers. Thank goodness for them. Had Admirals closed down last week I don't think we would have had the same interest. No sign of De Costa or Gutsche.*

*The winning bid will cost the purchaser not only R4.3 mill but transfer costs, electrical wiring certificate costing around R100 000, and all the repairs and maintenance demanded by the Body Corporate on top of that. (refer previous correspondence). Painting will cost R75 000 minimum: tarmac repair and waterproofing the roof etc will be big numbers. At the end of the day the purchaser is facing an outlay of about R5 million. A lot of money when you have a ''dicey'' tenant with a long lease and a blue chip tenant with a short lease. Not a situation conducive to peaceful sleep.*

*The M H Trust will receive R3.9 net plus about R50 000 in occupational interest, so close to R4 mill. The Seller will be entitled to outstanding and current rentals up until the end of March, but will be liable for levies and Municipal costs, up to that date.*

*A levy clearance certificate from the Body Corporate will have to be obtained before we can effect transfer this will cost around R100 000 due to arrear B C levies and arrear Municipal water and sewage charges. Over and above that we will need a Rates Clearance Certificate from the Municipality. I will contact the Municipality to determine what that will cost.*

*The Municipal valuation of Unit 1 is R2.8 mill so we have done a lot better than that.*

*Whether or not Unit 1 Manor Hastings Trust accepts this offer, it will have to make urgent payment of R50 000 to the Municipality before Friday otherwise it will switch off the electricity supply. I was able to persuade them to hold off doing so until after the auction. (my email to you dated 8 March to which I have not had a reply). The other R50 000 for levies is not as urgent but the B C is losing patience about the arrear situation.*

*A deposit of R390,000 was paid by the purchaser today. It will be paid into Unit 1 Manor Hastings bank account on acceptance of this offer and would be available immediately to pay the above creditors.*

*Your decision is urgently required*

*Cheers for now*

*Arthur''*

[58] *Dr Coutsouridis* confirms that in terms of the content of the email, he was unaware that ''Admirals'' had intended closing down, nor that the electrical wiring certificate would cost R100 000-00, and of the Body Corporate's arbitration award. He further did not budget for an amount of R5 million.

[59] During cross-examination by *Mr Mullins* for the First to the Fourth Defendants, it was put to *Dr Coutsouridis* that the Trustees were unaware of any representations made by the Fifth Defendant to him. *Mr Mullins* put to *Dr Coutsouridis* that there had in fact been no direct contact between him and the trustees of the Trust regarding the sale of the property.

[60] It was further put to *Dr Coutsouridis* that whilst the First to the Fourth Defendants may have been negligent in their conduct in the matter, no semblance of fraud could be attributed to them.

[61] It was further put to *Dr Coutsouridis* that notwithstanding the information he received pursuant to the purchase of the property which was withheld from the Plaintiff, and which he submits had been fraudulently withheld, he still appeared to want to proceed with the sale, and that he merely requested a reduction in the purchase price. *Dr Coutsouridis* submitted in response, that he entertained the possibility of continuing

with the agreement but he still had not been placed in possession of all the necessary information pertaining to the property in order for him to make such decision.

[62] *Mr Williams* on behalf of the Fifth Defendant in essence cross-examined *Dr Coutsouridis* as to him being bound to the agreements he had signed, namely the ‘’Rules of Auction’’ and ‘’Conditions of Sale’’. *Dr Coutsouridis* in reply confirmed that he would be bound by the terms of such agreements had no fraud been perpetrated against him. It was also put to *Dr Coutsouridis* that the information pertaining to the property and the request for further information regarding the property by the Plaintiff had in fact been obtained by the Fifth Defendant from the Sixth Defendant namely *Mr Marriner*.

[63] Upon cross-examination by *Mr Van Rooyen* for the Sixth and Seventh Defendants, *Dr Coutsouridis* confirmed that he only became aware of the lease between ‘’Admirals’’ and the Trust and in particular the suspensive conditions contained therein, pursuant to the Plaintiff purchasing the property. This he had discovered after a meeting he held with *Mr Shamley* the owner of ‘’Admirals’’ pursuant to the purchase of the property.

## APPLICATION FOR ABSOLUTION FROM THE INSTANCE:

[64] At the close of the Plaintiff’s case all the Defendants applied for absolution from the instance, and requested that the Plaintiff’s claim be dismissed with costs. After hearing argument from counsel for the Defendants and for the Plaintiff, I dismissed the applications and advised that my Judgment would follow in the main Judgment. I provide my reasons as follows.

THE LEGAL PRINCIPLE OF ABSOLUTION FROM THE INSTANCE:

[65] The legal principles that are applicable in applications for absolution from the instance are well established. In order to defeat an application for absolution, a Plaintiff must make out a *prima facie* case in the sense that there is evidence relating to all the elements of a claim on the strength of which the Court could or might find for the Plaintiff at the end of the case.[1] The Plaintiff at this stage of proceedings is further entitled to rely on any reasonable inference drawn from the evidence placed before the Court.

[66] Further a Court has a discretion whether to grant absolution from the instance or not. In exercising such discretion it has to determine whether it would be in the interests of justice to bring the litigation to an end. Where the legal position is uncertain the interests of justice are better served by the refusal of absolution.[2]

[67] *Mr Mullins* on behalf of the First to the Fourth Defendants argued succinctly that there was insufficient evidence placed before me to suggest that the First to the Fourth Defendants had made any misrepresentations to the Plaintiff. He further argued that the trustees had no control over their agent *Mr Marriner*, with the implication that they should not be held liable for any misrepresentations *Mr Marriner* may have made to the Plaintiff. *Mr Mullins* further argued that the Plaintiff having received all the necessary facts had in any event made an election to abide by the contract.

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[1] *Gordon Lloyd Page and Associates v Rivera and Another 2001 (1) SA 88 (SCA) at 92E-93A; Ruslyn Mining and Plant Hire (Pty) Ltd v Alexkor Ltd [2012] 1 All SA 317 (SCA) at paragraph 22.*

[2] *Carmichele v Minister of Safety and Security & Another 2001(4) SA 938 (CC) at paras [26] and [29]*

[68] *Mr Williams* on behalf of the Fifth Defendant argued that if the First to the Fourth Defendants application for absolution succeeded, then by necessary implication, so should the Fifth Defendant's application. He further argued that as the Plaintiff's claim against the Fifth Defendant, as pleaded was based on innocent and/or negligent misrepresentations, and that innocent and/or negligent misrepresentations can be excluded by parties to a contract, this was in fact done when *Dr Coutsouridis* signed the *''Rules of Auction and Conditions of Sale for Immovable Property''*. The Fifth Defendant he argued had in terms of clause 8.5 of such document contracted out of any innocent and/or negligent misrepresentations made, and that the Plaintiff was bound to such agreement.

[69] *Mr Williams* further argued that having regard to the essential elements required for the Plaintiff to prove fraudulent misrepresentations, the Plaintiff had failed to prove that the Fifth Defendant had been aware that the misrepresentations made were in fact false.

[70] *Mr Van Rooyen* on behalf of the Sixth and Seventh Defendants inveigled me to either disregard ''Annexure A'', being the bundle of documentary evidence handed in by agreement between the parties, or that I should hold that they should have little probative value. He argued in essence that having regard to the evidence of *Dr Coutsouridis* and the documentary evidence, there was very little support for the Plaintiff and the Court to draw the inference of fraudulent misrepresentations that were alleged to have been made by the Sixth Defendant.

[71] *Mr De La Harpe* for the Plaintiff in response to the arguments postulated on behalf of the respective Defendants in the application for absolution from the instance,

reiterated the principles applicable in such applications. He argued further that an inference of fraudulent misrepresentation may be made by the Court if the inferences sought to be drawn are reasonable in the circumstances. He further correctly argued that at the close of the Plaintiff's case and in assessing applications of similar ilk, a Court is quite entitled to refuse such application unless, it is satisfied that no reasonable court could draw the inferences for which the Plaintiff contends.

[72] *Mr De La Harpe* submitted further that having regard to the submissions made on behalf of the Trust and the Sixth Defendant, the Fifth Defendant had in fact been employed as an agent of both the Trust and the Sixth Defendant. The information provided by *Mr Galpin* to the Plaintiff regarding the verandah and the deposits held by the Trust in respect of the Lessees of the property had been false. The Fifth Defendant merely denied the allegations of fraudulent misrepresentations and placed the Plaintiff to the proof thereof. *Mr De La Harpe* submitted that counsel for the Fifth Defendant's submissions that the Fifth Defendant is still entitled to its commission even if I should find there to have been fraudulent misrepresentations made to the Plaintiff, to be an incorrect position in law. He further argued that that at the stage of the application, there were overwhelming evidence to draw the reasonable inference that the Plaintiff had been the victim of fraudulent misrepresentations. *Mr De La Harpe* entreated me to dismiss the applications.

[73] In assessing the Defendants application, the evidence placed before the Court as well as the legal principles applicable as at the stage of the Defendants application for absolution must be considered.

[74] It is common cause that the Sixth Defendant was at all material times acting as the agent on behalf of the Trust regarding the sale of the property.

[75] It is trite that our law has held that if an agent both (1) makes a representation, and (2) (a) knows (ie is conscious of the fact) that it is false, or (b) does not have an honest belief in its truth, being reckless, careless whether it be true or false, the legal position is the same as if the principal himself had made the representation with the requisite state of mind.[3]

[76] *Lord Brandwell* held in *Weir v Bell 3 ExD 243*, that: *''Every person who authorizes another to act for him in the making of any contract undertakes for the absence of fraud in that person in the execution of the authority given as much as he undertakes for its absence in himself when he makes the contract.''* This view has been affirmed in our Appellate Division.[4] It was further held by Trollip J in *Randbank (Bpk) v SantamVersekerings Maatskappy 1965(4) SA 363 (A) at……* that:

> *''The general principle is that where an agent contracting in the course of his employment and within the scope of his authority, fraudulently conceals or otherwise fails to disclose a fact known to him which, having regard to the nature of the contract, he ought to have disclosed to the other contracting party, his principal is liable for and must suffer the consequences of his concealment or non-disclosure. That responsibility of the principal attaches at any rate in regard to the voidability of the contract, even if he himself had no knowledge of the fact not disclosed or fraudulently concealed.''*

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[3] Kerr, Law of Principal and agent

[4] *Ravene Plantations Ltd v Estate Abrey and Others 1928 AD 143 at 153; Randbank (BPK) v SantamVersekerings Maatskappy 1965(4) SA 363 (A)*

[77] It is axiomatic that, whilst I may not find sufficient evidence of fraudulent misrepresentations on the part of the First to the Fourth Defendants, with *Mr Mullins* on their behalf submitting that their acts or omissions could at most only be construed as negligence, should I find the Sixth Defendant, *Mr Marriner's* conduct in the matter to amount to fraudulent misrepresentation, then consequently I may attribute this fraudulent misrepresentations to the First to the Fourth Defendants as well.

[78] The elements of proving fraud is well established:

(a) There must have been a representation made to a Plaintiff by the Defendant or the Defendant's agent,[5] it is trite law that a representation may consist of a non-disclosure;[6]

(b) It must be alleged that the fraud or misrepresentation was false and or intentional or negligent;[7]

(c) The representation must have induced the Plaintiff to act;[8]

(d) The Plaintiff must prove that he has suffered damages as a result of such misrepresentation.

[79] It has also been held that failure to disclose the complete truth in circumstances where there can be no doubt that silence may amount to a misrepresentation, are where part of the truth has been told but the omission of the remainder gives a misleading impression.[9]

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[5] *Feinstein v Niggli 1981(2) SA 684 (A)*
[6] *Stainer v Palmer-Pilgrim 1982(4) SA 205 (O)*
[7] *Rota Flour Mills(Pty) Ltd v Moriates 1957(3) ALL SA 28(T)*
[8] Bill Harvey's Invetsment Trust(Pty) Ltd v Oranjezicht Citrus Estate (Pty) Ltd 1958(1) SA 479 (A)
[9] *Marais v Edlman 1934 CPD 212.*

[80] Having regard to the advertisement brochure, the question then to ask is whether the Defendants knew that the brochure would leave potential buyers under a false impression and intend to leave them in that mistaken state of mind. Furthermore whether their silence could be construed so as to induce potential buyers to purchase the property or to pay more for it than it was really worth.

[81] In my view, the representation that rental income was being obtained from two lessees in the brochure, elucidated a clear intention to convey to any prospective purchaser that the purchase of the property was lucrative, as active income would be derived from the property. On the 28th February 2013, it was confirmed to *Dr Coutsouridis*, who at that stage was still a prospective purchaser, that ''Admirals'' was paying an amount of R52 000-00 per month. The brochure gave the public, and in particular *Dr Coutsouridis*, the distinct impression that not only were rental agreements in place for two tenants, but that there was as a matter of fact rental income being obtained from both lessees. It is apposite that ''Admirals'' had not been paying their rent since January 2013, hence the advertisement that there was a rental income of approximately R52 000-00 per month being received from ''Admirals'' was in my view a clear misrepresentation by the Trust and the Sixth Defendant's omission to disclose the fact that ''Admirals'' had in fact not being complying with their monthly rental obligations. It is common cause that the Trustees and *Mr Marriner* were well aware of this prior to the publication of the brochure.

[82] It is further apposite from the evidence presented that *Dr Coutsouridis* confirmed that he had been drawn to the prospect of purchasing the property, by the advertised rental income as set out in the advertisement produced by the Fifth Defendant. It

subsequently came to his knowledge after his successful bid that the representations made by *Mr Galpin* for the Fifth Defendant regarding the inclusion of the verandah as part of the property to be sold and the rental income deposits allegedly held by the Trust for the current Lessees were false.

He also discovered after the auction that the anchor tenant of the property, ''Admirals'', where in fact in financial trouble and had not been abiding to its monthly rental income of R52 000-00 per month since January 2013. He also further discovered that there was a possibility that the lease agreement between the Trust and Vaidro 120 CC being the juristic ego of ''Admirals'', could be held to be non-binding due to the non-fulfillment of certain suspensive conditions in the lease agreement. He finally also discovered further that there was an arbitration order made against the Trust as owners of the property, in favour of the Body Corporate of the property that would necessitate a significant financial outlay for costs, *inter alia* for repairs and maintenance to the property.

[83] *Mr Marriner's* correspondence to the First, Second and Fourth Defendants, on the 12th March 2013, has a significant bearing, especially when one has regard to the respective cases as pleaded by the First to the Fourth Defendants and *Mr Marriner* the Sixth Defendant. It is evident from this correspondence that Mr Marriner confirmed his view that '' ***The winning bid will cost the purchaser not only R4.3 mill but transfer costs, electrical wiring certificate costing around R100 000, and all the repairs and maintenance demanded by the Body Corporate on top of that.)(My emphasis)*** *(refer previous correspondence). Painting will cost R75 000 minimum: tarmac repair and waterproofing the roof etc will be big numbers. At the end of the day the purchaser is facing an outlay of about R5*

*million. A lot of money when you have a ''dicey'' tenant with a long lease and a blue chip tenant with a short lease. Not a situation conducive to peaceful sleep.''*

*Mr Marriner's* view was never contradicted or queried by the First to the Fourth Defendants as being inaccurate. It was further never put to *Dr Coutsouridis* that the First to the Fourth Defendants disagreed with *Mr Marriner's* submissions as postulated in the above email. That being the case, their respective pleadings to the extent that the arbitration award as well as the issue of the leaking roof were obligations attaching to the Trust and not the Plaintiff is contradictory to say the least. It must be further pointed out that the Trustees in the matter only signed the acceptance of the sale agreement pursuant to the above email from *Mr Marriner.*

[84] The further reference to their being a *''dicey tenant''*, gave credence to the Plaintiff's assertions that he had become aware only pursuant to the purchase of the property that the anchor tenant ''Admirals'' had been in default of its rental payments well before the sale of the property on auction, and was in financial stress and that this was a fact well known to the First to the Fourth and the Sixth Defendants, and that such information had deliberately not been disclosed to him prior to the purchase of the property. In the premises I was of the view that a *prima facie* case for fraudulent misrepresentation had been established by the Plaintiff.

[85] The application of the Fifth Defendant presents a different position. As quite correctly pointed out by *Mr Williams* for the Fifth Defendant, at the close of the case for

the Plaintiff, there was insufficient evidence to persuade me of the Fifth Defendant's complicity in any act of fraudulent misrepresentation. It is apposite that the Fifth Defendant had been acting on instruction of the Sixth Defendant and the information obtained for the publication of the brochure, and the conveyance of further information regarding the property as requested by the Plaintiff, had as a matter of fact been obtained from the Sixth Defendant.

[86] *Mr Williams* further submitted that the Plaintiff is bound to the contractual agreement signed with the Fifth Defendant being the *''Rules of Auction''* and the *''Conditions of Sale for Immovable Property''* which sets out the Plaintiff's obligation to pay the Fifth Defendant's commission. *Mr Williams* submits further that in terms of clause 8.5 of the ''Conditions of Sale'', Fifth Defendant and the Plaintiff contracted out of liability for any misrepresentations, but concedes that parties may not contract out of liability for fraud.

[87] Whilst I am of the view that at the stage of the application for absolution there was no evidence to evince any fraudulent misrepresentation made by the Fifth Defendant to the Plaintiff, I do not agree with *Mr Williams's* submission that in absence of a finding of fraudulent misrepresentation against the Fifth Defendant, that the Plaintiff is still bound to its contractual obligation with the Fifth Defendant. The Fifth Defendant's agreement with the Plaintiff is inextricably bound with the sale agreement between the Plaintiff and the Trust as seller. A finding of fraud in the primary sale agreement between the Plaintiff and the First to the Fourth Defendants will vitiate such agreement and all associated agreements with the primary transaction including the agreement between the Plaintiff and the Fifth Defendant.

[88] Our Courts have held that fraud is conduct which vitiates every transaction known to law, *Lord Denning in Lazarus Estates Ltd v Beasley [1956] 1 QB (CA) at 712, held:*

*''No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever;…''*

The above principle has been confirmed with approval by our Courts.[10]

[89] *Mr Van Rooyen* on behalf of the Sixth and Seventh Defendants submitted that the bundle of documents handed in as 'Exhibit A'', as well as the affidavits contained in the application proceedings has little or no probative value. I do not concur. At the outset of the trial ''Exhibit A'' was handed in by consent by all the parties. There were no objections to the content of ''Exhibit A'' being inaccurate or false. Furthermore when *Dr Coutsouridis* on behalf of the Plaintiff was questioned regarding the Sixth Defendant's email to the First, Second and Fourth Defendants, on the 12th March 2013, at no stage was it ever put to him by *Mr Van Rooyen* that the Sixth Defendant disputed the content of such correspondence, and in particular that he was not in fact the author of such email.

[90] *Mr Van Rooyen* further submitted that having regard to the content of the email of the 12th March 2013, that the content of such email is one of interpretation. The email

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[10] *First Rand Bank Ltd t/a Rand Merchant Bank & Another v Master of the High Court, Cape Town & Others [2103] ZAWCHC 173 (11 November 2013) paras 20-27; Esofranki Pipelines v Mopani District Municipality (40/13) [2014] ZASCA 21 (28 March 2014)*

contained very little support for the Plaintiff or the Court to draw an inference of fraudulent conduct on the part of the Sixth Defendant, and consequently there was no reason for the Sixth Defendant to explain himself. I disagree with these submissions. From the Sixth and Seventh Defendant's pleadings in defence of the action and having regard to the content of the Sixth Defendant's email to the Trustees, there is a stark and clear contradiction, which in my view the Sixth Defendant needed to explain.

[91] In the circumstances I dismissed the Defendants application for absolution.

THE EVIDENCE OF THE SIXTH DEFENDANT:

[92] Upon dismissal of the Defendants application for absolution from the instance, the First to the Fourth Defendants as well as the Fifth Defendant closed their respective cases. *Mr Van Rooyen* on behalf of the Sixth and Seventh Defendants called the Sixth Defendant, namely *Mr Arthur Marriner* to provide evidence.

[93] *Mr Marriner* confirmed that he was a family friend of the *Batchelor Family*, of whom the First, Second and Fourth Defendants are such family members. He submits that on or during November 2012, he was contacted by the Fourth Defendant herein, to assist in particular with sale of a family asset, being the property in question.

[94] *Mr Marriner* confirmed that he suggested to the family that the property be sold on auction, to which they agreed. He then approached *Mr Ashton Galpin*, an employee of the Fifth Defendant to ostensibly arrange for the auction of the property. It was then agreed that the property be sold in the new year, with the date being arranged for the

auction being the 12th March 2013. Mr Marriner further confirmed that he had reached an agreement with *Mr Galpin*, that they split the commission of the sale of the property.

[95] On a question from *Mr Van Rooyen* as to when he became aware of the arbitration award made against the Trust, he initially replied that he could not recall, and when pressed as to whether it was before or after the sale of the property, he exclaimed that it was after the sale of the property. His assertions in this regard when questioned by *Mr Van Rooyen,* were in stark contrast to a letter addressed to him by BLC Attorneys on the 11th February 2013 wherein which it was quite evident that he was aware *inter alia* of the issue of the leaking roof, that in order for an electrical wiring certificate to be obtained electrical renovations would need to be attended to or the property could have been condemned, that such costs would be in the region of R110 000-00. He was further well aware of the arbitration award made against the Trust. The content of this correspondence was merely confirmation of a meeting held between *Mr Marriner* and BLC Attorneys on the 04th February 2013.

[96] Mr Marriner testified further that regarding the issue of the arbitration award he was of the view that the Trust and not the purchaser of the property would be responsible for complying with such order. As pointed out above *Mr Marriner's* assertions in this regard stand in total contrast to the content of the email he dispatched to the First, Second and Fourth Defendants on the 12th March 2013. When he was questioned by *Mr Van Rooyen* about this particular correspondence, *Mr Marriner* remarked that he was surprised that this particular correspondence had been obtained and was being utilized in the legal proceedings as same was confidential and that it should never have ''gotten into the hands of attorney's. When asked by *Mr Van Rooyen* as to what he meant that

any potential purchaser must pay the cost related to the arbitration award, his response was *''I made a mistake here.''* On referring to *''dicey tenant'' Mr Marriner* exclaimed that he was referring to the restaurant business in this regard. He further confirmed that he was attending to the transfer of the property whilst he was in the employ of C.R Knoesen Attorneys, and that he would also benefit from the fees for attending to such transfer, as well as the split commission.

[97] *Mr Marriner* further testified that he never fraudulently withheld information from the Plaintiff. He submitted that he was of the view that *Mr Shamley* the owner of ''Admirals'' would obtain a bond and would pay the arrears due. He further submitted that as far as he was concerned he was of the view that the Trust would be liable for repairing of the leaking roof and the costs related to the arbitration award. *Mr Marriner's* assertions in this regard stand in stark contrast to his email to the First, Second and Fourth Defendants on the 12th March 2013.

[98] In cross examination by *Mr De La Harpe* for the Plaintiff, *Mr Marriner* conceded that he and the Trust knew prior to the sale of the property, that ''Admirals'' were in arrears. He further confirmed that the information contained in the brochure, emanated from him. When questioned about the income set out in the brochure, *Mr Marriner* submits that this was merely *''projected income''*. He was unable to explain as to why the words *''projected income''* do not appear on the brochure in confirmation of his view. He also advised that he did not deem it necessary to inform *Mr Galpin,* the auctioneer that ''Admirals'' had been in arrears, nor did he deem it necessary to set out in the brochure that ''Admirals'' where in arrears. He further conceded that prior to the sale he had been

well aware that ''Admirals'' were in arrears, and that *Mr Shamley* the owner had to attempt to obtain a bond in order to pay the arrears.

[99] Regarding his non-disclosure of the leaking roof and the arbitration award, *Mr Marriner* submitted that he maintained his view that the Trust would be responsible for such costs. On a question from *Mr De La Harpe* as to why he failed to disclose the arbitration award when the Plaintiff had made a request for further information regarding the property during February 2013, *Mr Marriner* conceded that he had an obligation to convey such information, but that his failure to do so was not deliberate.

[100] Upon further cross-examination, *Mr Marriner* confirmed that pursuant to the sale of the property, he made a proposal to the Plaintiff in essence that as the Plaintiff had to be responsible for the payment on interest on the balance of the purchase price, that the Trust retain the monthly rental income of the tenant ZTE, he conceded that this proposal had been made whilst he was well aware that ''Admirals'' had not being paying their rent. The proposal was set out in an email to *Dr Coutsouridis* on the 02$^{nd}$ April 2013. In said email *Mr Marriner* remarks to *Dr Coutsouridis* that he had no personal interest in the matter. This was clearly untrue as *Mr Marriner* would benefit from the split commission and the legal fees for attending to the transfer of the property. He advised that he informed the Trust of his benefits from the sale only after the sale of the property.

[101] *Mr Marriner* upon being cross-examined regarding a meeting he held with *Mr Shamley*, the owner of ''Admirals'' on or during January 2013 where he was informed by *Mr Shamley* that ''Admirals'' where in financial trouble and that he wanted to close ''Admirals'' doors, and that at such meeting *Mr Marriner* had in fact advised *Mr Shamley*

not to close the restaurants doors, as the Trust intended to sell the property on auction, *Mr Marriner* confirmed same but submitted that he had said this as *Mr Shamley* intended to obtain a loan. I find this submission to be totally implausible.

[102] Upon cross-examination, specifically regarding his submissions of a *''dicey tenant''* in the correspondence of the 12th March 2013, *Mr Marriner* was called upon to explain the apparent discrepancy in his reply in his evidence in chief, that he meant *''dicey tenant''* to mean the restaurant business, whilst in an affidavit he deposed to in the application proceedings, he clearly stated that when he referred to *''dicey tenant''*, he actually meant ''Admirals'' being in arrears. *Mr Marriner* was unable to explain this discrepancy. He was further unable to explain the submissions made in the 12th March 2013 email confirming that the purchaser would be liable for the leaking roof, the costs relating to the arbitration award and the costs for obtaining an electrical certificate, as compared to his evidence in Court that he was of the view that the Trust would be liable for such costs.

[103]There was no cross-examination of *Mr Marriner* on behalf of the First to the Fifth Defendants.

## EVALUATION OF THE EVIDENCE:

[104]In evaluating the Plaintiff's claim, and the pleaded basis of such claim being based upon fraudulent misrepresentation, I in essence have to consider whether the Defendants failure to disclose certain material information pertaining to the property,

prior to its sale amount to fraudulent misrepresentation. Having regard to the evidence it is trite that consideration must be given to the following namely:

(a) Whether the Defendants failure to disclose that the property's main tenant ''Admirals'', were in financial strife and had as a matter of fact not been complying with their rental obligations for a while prior to the sale of the property on auction, despite the advertisement that ''Admirals'' was generating an income, amounted to a fraudulent misrepresentation, and;

(b) Whether the Defendants failure to disclose that the roof of the building was leaking and was in need of repair amounted to a fraudulent misrepresentation ;

(c) Whether the Defendants failure to disclose the existence of an arbitration award against the Trust as owners of the property, requiring the owners to effect certain repairs and maintenance to the property, amounted to a fraudulent misrepresentation;

(d) Whether the Defendants failure to disclose that the property would require extensive and costly repairs to the electricity infrastructure in order for the Plaintiff to obtain an electrical wiring certificate, amounted to a fraudulent misrepresentation.

[105] *Dr Coutsouridis* testified on behalf of the Plaintiff and confirmed that had he been aware of the above information that had not been disclosed to him, he would not have purchased the property. I found there to be no contradictions or inconsistencies in his evidence.

[106] *Mr Marriner,* the Sixth Defendant, failed to impress me as a witness. His fastidious attempts at providing a seemingly innocent explanation for his conduct in the matter

was ephemeral when elucidated against the glaring contradictions of his evidence in chief and the documentary evidence he was the author of. A case in point being the fact that he testified in evidence in chief that he only became aware of the arbitration award after the sale of the property, when it was quite clear from a correspondence addressed to him from BLC attorneys (which he does not dispute), on the 11th January 2013, that he was well aware of the arbitration award.

[107] A further example of *Mr Marriner's* disingenuous conduct was the fact that in an email addressed to *Dr Coutsouridis* on the 02nd April 2013 he advised that he had no personal interest in the matter. This was never disputed by *Mr Marriner*. This was clearly an untruth as *Mr Marriner* had already made arrangements to split the commission of the sale of the property with the Fifth Defendant and he further stood to benefit financially by attending to the transfer of the property as well. He submitted that he advised the Trustees of this fact pursuant to the sale of the property.

[108] *Mr Marriner* tried to convince the Court that the reason he failed to disclose to the Plaintiff that the anchor tenant ''Admirals'' was in financial strife and were in arrears in their rental payments, was that he believed that they would obtain a loan to clear up the debt. It was clear from the evidence that *Mr Marriner* held a meeting with *Mr Shamley* of ''Admirals'' during January 2013 already, when *Mr Shamley* advised him that he intended to close the doors of the restaurant. *Mr Marriner* advised him not to do so as the owner where planning to sell the property on auction. The only reasonable inference that can be drawn here is that *Mr Marriner* needed ''Admirals'' to remain open in order for him to advertise them as a current tenant with a monthly income stream. When asked as to why ''Admirals'' financial issues were not set out in the brochure and was

stated as fact in the brochure that ''Admirals'' was bringing in a rental income of approximately R52 000-00 per month, he submitted that the income portrayed was merely a *''projected income''*. His explanation in this regard is improbable.

[109] *Section 29 of the Consumer Protection Act 68 of 2008* requires the marketing of goods or services to be done in a manner that is not reasonably likely to imply a false or misleading representation concerning those goods or services and not misleading, fraudulent or deceptive in any way. The brochure in this matter was a marketing tool employed to entice prospective purchasers. The brochure advertises that leases were in place for ''Admirals'' for the period 01st September 2012 to 31st August 2017, with a specified rental income of R52 000-00 per month derived from them, and with ''ZTE'' for the period 01st November 2012 to the 31st October 2013, with an income of R34 000-00 per month.

[110] It is quite evident that the rental income obtainable from the tenants of the property being ''Admirals'' and ''ZTE'' at the time was specifically and deliberately set out in the brochure so as to attract any potential purchaser as to the ''lucrative'' prospect of purchasing the property, as one would derive a rental income from same. Any potential purchaser would reasonably rely on the information set forth in the brochure to assess whether it would be worthwhile to purchase the property. *Dr Coutsouridis* confirmed that he relied on the information to make *''desk top calculations''* to assess whether to purchase the property or not.

[111] A failure to disclose that ''Admirals'' was a defaulting tenant, a fact which *Mr Marriner* knew as far back as January 2013 that they had been unable to pay their debts and that the owner *Mr Shamley* had advised he intended to close his doors, was in my

view a clear misrepresentation as to the factual situation. The failure to disclose this information was neither negligent nor innocent in the light of *Mr Marriner's* foreknowledge of ''Admirals'' financial woes. The failure to disclose to a prospective purchaser that a tenant has defaulted in its payment obligations and had remained so at the time of the advertisement of the auction, and at the auction itself as in the present circumstances is in my view a material misrepresentation. If a seller specifically advertises that specific rental income is attached to an immovable property, and is well aware that the Lessee is in default of its obligations, and has remained in such default until the date of sale, then in my view the seller has a duty to disclose such default. A failure to disclose same where in the circumstances a reasonable purchaser would rely on such information as has been duly advertised to the general public, then this deliberate act of non-disclosure must in the circumstances amount to a fraudulent misrepresentation.

[112] The advertisement of the tenants, ''Admirals'' and ''ZTE'', and their respective incomes was deliberate act in attracting potential purchasers. There was a duty on the Trust by way of its agent *Mr Marriner* to have disclosed this fact, which they chose not to. *Mr* Marriner had an opportunity on the 25th February 2013 to disclose this fact to the Plaintiff when the lease agreements were called for by the Plaintiff. He had a further opportunity to disclose this fact when *Dr Coutsouridis* inspected the premises on the 05th March 2013. He had yet a further opportunity to disclose such information on the day of the auction, and even pursuant the sale, he chose not to. *Mr Marriner* in fact, whilst in the full knowledge that ''Admirals'' had not obtained a bond and remained in arrears, proposed that the Trust retain the rental income of ''ZTE'' which tenant had

been complying with their rental obligations, and that the Plaintiff retain the rental income of ''Admirals'' knowing full well that such rental payments would not be made. In the premises, it is clear that a material non-disclosure was made to *Dr Coutsouridis*, the non-disclosure was intentional, as to disclose same would have in all probability not have garnered the same interest or the amount for the purchase of the property, this much has been confirmed by *Mr Marriner,* in his email to the First, Second and Fourth Trustees, on the 12th March 2013, ''… *Thank goodness for them. Had Admirals closed down last week I don't think we would have had the same interest.'' (My emphasis).*

[113] *Dr Coutsouridis* testified that the advertised rental income had induced him to purchase the property as it had been integral in making his ''desk top calculations'', and that the failure to disclose the information had resulted in him suffering the damages he now claims. The advertised rental income was a material factor in him deciding to purchase the property.

[114] In *Trotman and Another v Edwick 1951(1) SA 443 (A), Van Den Heever JA held at 446H-447A:*

> *''(H)aving made a certain impression upon the mind of the plaintiff by fraudulent misrepresentations, they [the sellers] did not thereafter and before the sale disabuse his mind; consequently the effect of the misrepresentation continued to operate until the deed of sale was signed. It furnishes a link in the causal chain between the alleged false representation and the conclusion of the sale.''*

[115] Having regard to the above and applying the legal principles applicable in establishing the elements of fraudulent misrepresentation, as set out above, I find the

Sixth Defendant's conduct in not disclosing the primary tenant ''Admirals'', financial strife prior to the sale of the property, to amount to a fraudulent misrepresentation. Having regard to the fact that the Sixth Defendant was acting as an agent for the Trustees of the Trust at all material times and in accordance with the principal/agent relationship, I find the First, Second and Fourth Defendants are bound to the fraudulent misrepresentations made by the Sixth Defendant.

[116] I turn now to the issue of the leaking roof, the arbitration award and the costs for repairs to the electrical infrastructure of the property.

[117] It is trite that the First, Second, Fourth and Sixth Defendants have pleaded in essence that *Dr Coutsouridis* failed to carry out his due diligence regarding the issue of the leaking roof during his inspection of the property prior to the sale, and in any event due to the ''Voetstoots Clause'', contained in the sale agreement, they did not have to disclose this particular fact to the Plaintiff.

[118] The *locus classicus* case regarding the issue of ''Voetstoot Clauses'', is the matter of *Van Der Merwe v Meades 1991(2) SA 1 (A).* The Court in essence held that a seller will be deprived of the protection afforded by a ''Voetstoots Clause'' where the purchaser can prove that the seller (1) was aware of a defect in the *merx* at the time of the making of the contract and (2) *dolo malo* concealed its existence from the purchaser with the purpose of defrauding him.

[119] It is common cause that Sixth Defendant was well aware of the leaking roof, the arbitration award and the cost of repairing the electrical infrastructure prior to the sale of the property.

[120] In *Mcann v Goodall Group Operations (Pty) Ltd 1995(2) SA 718 (C), Van Zyl J* developed a few examples of a legal duty to disclose, pursuant to a discussion of authorities on the law relating to liability for actionable non-disclosure, whether fraudulent or negligent. The examples are by no means a *numerus clausus* of the occurrence of a duty to disclose, but include:

(a) A duty to disclose a material fact arises when the fact in question falls within the exclusive knowledge of the defendant and the plaintiff relies on the frank disclosure thereof in accordance with the legal convictions of the community;

(b) Such duty likewise arises if the defendant has knowledge of certain unusual characteristics relating to or circumstances surrounding the transaction in question and policy considerations require the plaintiff be apprised thereof;

(c) Similarly, there is a duty to make a full disclosure if a previous statement or representation of the defendant constitutes an incomplete or vague disclosure which requires to be supplemented or elucidated.[11]

[121] In *ABSA Bank Ltd v Fouche 2003(1) SA 176 (SCA) at 180H-181C, Conradie JA*, in a majority judgment stated that:

*''A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover is such that the right to have it communicated to him ''would be mutually recognized by honest men in the circumstances.''*

[11] *Mcann v Goodall Group Operations(Pty) Ltd (at 726A-D)*

[122] It is an established principle in our law that a Plaintiff relying on the non-disclosure of a defect in order to resile from a contact must prove that:

(i) The Defendants were aware of the defect(s) as pleaded, if indeed the defects were latent, at the time of sale;

(ii) The Defendants had a duty to disclose the existence of the defects (as pleaded) to the Plaintiff at the time of the sale;

(iii) The Defendants fraudulently concealed the existence of the defects, thereby inducing the contract, alternatively that the Defendants fraudulently misrepresented that there were no defects.

[123] Our Courts have held that the definition of ''Latent'' means *''not apparent or reasonably capable of perception''.*[12] In the present matter it is quite apparent that the issue of the leaking roof was a latent defect. The defect would not have been apparent or reasonably capable of being perceived by *Dr Coutsouridis*. This information was within the knowledge of the Trustees and *Mr Marriner* in particular. They accordingly had a duty to disclose such defect but failed to do so. In *Speight v Glass and Another 1961(1) SA 778 (D) at 782A, Fannin J* held that '*'a seller who knows of the existence of defects in the thing sold, but deliberately refrains from disclosing them to the buyer, is guilty of fraud…''*

[12] *Forsdick v Youngelson 1949(2) PH A57 (D)*

[124] I am of the view that in the Seller/Purchaser relationship, the information pertaining to the leaking roof, the arbitration award made against the seller and the cost of the electrical repairs fell exclusively within the knowledge of the Sixth Defendant at the time of the sale of the property. There was a duty to disclose this to the Plaintiff prior to the sale, which *Mr Marriner* failed to do. This information was in my view purposefully withheld as to have advised any prospective purchasers of same would not have resulted in a sale or the property or the property would have been sold at a drastically reduced price.

[125] It would be reasonable to infer from all the circumstances that this non-disclosure was accordingly accompanied by fraudulent intent on the part of the Sixth Defendant who sought to gain an advantage over the Plaintiff in the contract of sale. Silence in this instance arising from the Defendants knowledge of the facts and the deliberate decision not to reveal them is in my view clearly fraudulent.

[126] As set out above the First, Second and Fourth Defendants are bound by the fraudulent actions of the Sixth Defendant and are consequently also liable. Regarding the Fifth Defendant, as rightly conceded by *Mr Williams*, a finding of fraud in the circumstances would set aside the agreement between the Plaintiff and the Fifth Defendant, as parties cannot contract out of fraud.

<u>THE ISSUE OF ELECTION:</u>

[127] *Mr Mullins* for the First, Second and Fourth Defendants argued that the Plaintiff could not resile from the contract, as it had elected to abide by the contract despite becoming aware of the non-disclosed information.

[128] Election of remedies is the liberty of choosing a particular remedy out of several means afforded by law for the redress of an impugned right, or choosing one out of several causes or forms of action. An election of remedies arises when one having two co-existent but inconsistent remedies chooses to exercise one, in which event he or she loses the right to thereafter exercise the other. The doctrine provides that if two or more remedies exist that are repugnant and inconsistent with one another, a party will be bound if he or she chooses one of them.

[129] In *Hlatwayo v Mare and Deas 1912 AD 242 at 259, De Villiers JP* dealing with the doctrine of election of remedies stated:

> *'' At the bottom the doctrine is based upon the application of the principle that no one can be allowed to take up two positions inconsistent with one another, or as commonly expressed to blow hot and cold, to approbate and reprobate.''*

[130] In the present matter, it is common cause that pursuant to the sale of the property and when *Dr Coutsouridis* had become aware of the information that had not been disclosed to him prior to the sale of the property, various correspondence were exchanged between the legal representatives for the Plaintiff and those of the Trust, wherein which the Plaintiff requested various further information pertaining to the property. The information was not forthcoming, which resulted in Plaintiff formally

requesting the information in terms of the Promotion of Access to Information Act 2 of 2000. From the content of the various correspondence it was clear that the Plaintiff still entertained the possibility of continuing with the agreement under perceivably the aedilitian remedy, in particular the *actio quanti minoris*, being a reduction of the purchase price.

[131] The Trust refused to a reduction of the purchase price and claimed to cancel the agreement, on the basis that the Plaintiff had failed to timeously provide certain financial guarantees, whereafter the Plaintiff disputed such cancellation. It is common cause that in correspondence by the Plaintiff's attorney to the Trusts attorney's, on the 30th August 2013, it is stated as follows:

> *''There can be no doubt that our client is entitled to a reduction of the purchase price or even to cancel the agreement.''*

[132] It is clear from the above that the Plaintiff had not yet made an election to proceed with a particular legal course of action against the Trust. Subsequent to this correspondence the Trust's attorneys advised that their client had terminated the agreement due to the Plaintiff's failure to provide certain guarantees.

[133] *Dr Coutsouridis* confirmed in evidence that he had not made an election to abide by the contract as he still awaited further information from the Trust which had not been forthcoming. I am accordingly of the view that the Plaintiff had at this stage no yet made an election as to proceed by way of the Aedilitian Remedy or to cancel the agreement and claim damages.

[134] However even if it may be construed that the Plaintiff had made an election to abide by the contract, our Courts have held that while ordinarily a party had to choose which remedy to pursue on breach by the other party to a contract, and was bound by the choice, there is authority for the view that the innocent party could change an election made after giving the party in breach the opportunity to perform. If he or she persisted in the repudiation, thus failing to repent, the innocent party could change his or her election and choose to cancel the contract.[13] This principle has been confirmed in the matter of *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality [2017] ZASCA 73.*

[135] Even if one holds the view that the Plaintiff had made an election to abide by the contract,  the Trust's continued failure to provide the further information requested by the Plaintiff's legal representatives on numerous occasions*,* amounted to, in my opinion, as a continuing repudiation of the agreement. Accordingly the Plaintiff would have been entitled to change its election and to proceed to cancel the agreement and claim damages, which it has done.

[136] In the premises, I am of the view that the contract of sale stands to be cancelled. The Plaintiff should accordingly be entitled to be placed in the position that it would have been in had the contract not been concluded.

[137] An order is made in the following terms:

(a) That the Unit 1 Manor Hastings Trust (''the Trust), pay the Plaintiff the sum of R835 740.00 together with interest thereon at the legal rate of interest from

[13] *Sandown Travel(Pty) Ltd v Cricket South Africa 2013(2) SA 502 (GSJ)*

the 14th March 2013 to date of payment, jointly and severally with the Fifth Defendant to the sum of R223 440.00 together with interest thereon at the legal rate of interest from 14th March 2013 and jointly and severally with the Sixth Defendant to the sum of R222 300.00 together with interest thereon at the legal rate of interest from 14th March 2013 to date of payment;

(b) That the sum of R390 000.00 together with interest accrued thereon, that the First, Second and Fourth Defendants attorneys hold in an interest bearing trust account in terms of paragraph 4 of the Order of Gqamana AJ dated the 20th March 2014, be paid to the Plaintiff in part payment of the amount due in terms of paragraph (a) above;

(c) Payment by the Trust and the Fifth, Sixth and Seventh Defendants, jointly and severally, of the costs of suit including the costs of the application and all reserved costs together with interest thereon, calculated at the legal rate of interest from a date 14 (fourteen) days after allocator to date of payment.

V NAIDU

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv D de la Harpe instructed by Schoeman Oosthuizen Inc, Port Elizabeth

For 1st, 2nd & 4th Defendant: Adv Mullins SC instructed by Kaplan Blumberg, Port Elizabeth

For 5th Defendant: Adv Williams instructed by P G Prinsloo Attorneys, Port Elizabeth

For 6th & 7th Defendant: Adv van Rooyen instructed by Lexicon Attorneys, Port Elizabeth