

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: **2022/5838**

(1)	REPORTABLE: YES ☒ NO
(2)	OF INTEREST TO OTHER JUDGES: YES ☒ NO
(3)	REVISED: YES/NO
11/10/2023	
DATE	SI

In the matter between:

SOUTH AFRICAN AIRWAYS SOC LTD

Excipient

and

KCT LOGISTICS CC

Respondent

In re:

SEAWORLD MANAGEMENT SERVICES (PTY) LTD

Plaintiff

and

KCT LOGISTICS CC

Defendant

and

SOUTH AFRICAN AIRWAYS SOC LTD

Third Party

JUDGMENT

HA VAN DER MERWE, AJ:

- [1] This is an exception against a third party notice, on the basis that in the annexure to the notice, no case sustainable in law is pleaded against the third party. South African Airways SOC Ltd is the excipient and the third party. The respondent in the exception is KCT Logistics CC. The respondent is also the defendant. The plaintiff is Seaworld Management Services (Pty) Ltd. The plaintiff did not participate in the hearing of the exception.
- [2] The plaintiff's claim against the respondent is for payment of unpaid rent due in terms of a written sub-lease agreement. The plaintiff pleads in the particulars of claim that it is a sub-lessee in terms of a sub-lease agreement concluded between the plaintiff and a company called Seaworld Aviation Services (Pty) Ltd, with the latter having concluded a "head" lease agreement with Transnet SOC Ltd. The respondent is thus a sub-sub-lessee. The respondent does not deny these allegations in its plea. The lease and sub-lease agreements were concluded in respect of the same premises.
- [3] The substance of the defence pleaded in the respondent's plea, so far as it is relevant to the exception, is that the plaintiff was not entitled to conclude the sub-lease agreement on which it relies, with the respondent. The case pleaded by the respondent in the annexure to the third party notice is conditional on it being found in favour of the plaintiff that the sub-lease agreement was validly concluded, in other words, conditionally on its defence against plaintiff's claim not being upheld.
- [4] In the annexure to the third party notice, the respondent pleads that subsequent to it having concluded the sub-lease agreement with the plaintiff, the excipient misrepresented to it that the plaintiff was not entitled to conclude that agreement with the respondent. Instead, so the respondent pleads, the excipient suggested to it that the respondent should conclude a lease agreement with it in respect of the same premises. The respondent accepted the excipient's representations and concluded a lease agreement with it, as the excipient suggested. Once the lease agreement was concluded with the excipient, the respondent paid rent to it and not to the plaintiff. The respondent thus finds itself in the position of having

concluded two agreements in which it leased (or sub-leased) the same premises but with two different lessors over the same period of time.

- [5] As the respondent did not pay rent to the plaintiff, it now faces the plaintiff's claim for unpaid rent.
- [6] Whether the defence pleaded by the respondent to the plaintiff's claim is sustainable, is open to serious doubt,¹ but that it is not a matter that calls for my attention.
- [7] In argument Mr Tisani who appeared for the excipient placed the fate of the exception on the following submission: The misrepresentations on which the respondent relies do not go the *facta probanda* of the respondent's claim against the excipient, in that it is not alleged that the excipient misrepresented any aspect of the lease agreement concluded with the excipient. The respondent does not, for instance, plead that the excipient misrepresented the extent of the leased premises or any of its other attributes. The misrepresentations are concerned with the respondent's motive in concluding the lease agreement with the excipient. Generally, an error in motive is not a ground on which a contract may be avoided.
- [8] Mr Tisani is correct that an error in motive does not afford the party in error with a ground to avoid a contract when it does not vitiate the mutual assent achieved between the parties. As was found by Miller J in *Diedericks v Minister of Lands*²:

"It is clear, however, that in our law, as in the law of England, a mistake which is merely incidental to the contract in the sense that it relates only to the reasoning or motivation of the party seeking to escape the consequences of the terms on which he agreed, does not vitiate or preclude mutual assent. (Cf. *de Wet Dwaling en Bedrog by die Kontraksluiting* at pp. 5 - 6; *Hahlo and Ellison Kahn ibid.* at pp. 455 - 6; and see *Banks v Cluver*, 1946 T.P.D. 451 at pp. 458 - 9). The words of Lord ATKIN, which I have quoted above, seem to me to epitomise the complaint of the defendant in this case; as a result of his own error, the defendant concluded a bad bargain instead of the good one he could

¹ See *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* 2016 (1) SA 621 (CC) at 23 –33.

² 1964 (1) SA 49 (N) at 56C-G.

have concluded had he not made that error. His position, in principle, is no different from that of a party who agrees to certain terms of a contract because he miscalculated his potential profit or forgot to take into account a factor which he should have included in his reckoning. The error which the defendant made did not relate to the identity or nature, or even to the quality of the subject-matter of the contract, for on that score the parties were *ad idem*, each receiving and giving exactly what he bargained for. What motivated him in making the offer to plaintiff was his conclusion that, in order to obtain the release of the required land from the terms of the 1953 agreement, it was necessary or advisable to offer a certain sum of money to plaintiff. This conclusion was wrong because he overlooked the resumption clause; this is what caused him to make a wrong appraisal of the situation. Such an error, as I have said, does not negative or exclude mutual assent.”³

- [9] However, the crucial question is whether an error in motive can be relied on if it is induced by a fraudulent misrepresentation. The respondent also relies on a negligent misrepresentation in the alternative, but for the reasons that follow, I need not decide whether a proper case on a negligent misrepresentation has been pleaded.
- [10] Mr Aldworth who appeared for the respondent submitted that a misrepresentation can be relied on so long as it is material. A misrepresentation will be material if it would have induced a reasonable person in the respondent’s position to conclude the lease agreement. As the respondent pleads that the misrepresentations on which it relies were material, a proper case is pleaded by the respondent.
- [11] Mr Aldworth is correct that if a misrepresentation would have convinced a reasonable person to conclude a contract, then the requirement of materiality is met.⁴ If that is the case, then it does not seem to me to matter that the misrepresentation created an error in the respondent’s motive for concluding the

³ See *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA).

⁴ *Novick and Another v Comair Holdings and Others* 1979 (2) SA 116 (W); *Rabinowitz v Ned-Equity Insurance Co Ltd and Another* 1980 (1) SA 403 (W) at 408.

lease agreement with the excipient. After all, fraud unravels all between the immediate parties to the fraud.⁵

[12] As stated above, all of the grounds of exception relied on by the excipient circle back to the same essential submission made by Mr Tisani on the misrepresentation inducing an error in the respondent's motive in entering into the lease agreement. As it is my view that an error in motive is actionable if it was induced by a fraudulent misrepresentation, it is the final word on all the grounds of exception on which the excipient relies, as Mr Tisani fairly conceded.

[13] It remains for me to deal with one other matter. The respondent's claim is in the first instance for restitution, so Mr Aldworth argued, although the word "restitution" does not appear in the annexure to the third party notice. The respondent pleads in the annexure to the third party notice that the lease agreement concluded with the excipient was tainted by the excipient's fraudulent misrepresentation. It also claims repayment of the amounts it paid to the excipient.

[14] The respondent does not tender to restore what it received pursuant to the lease agreement concluded with the excipient. The general rule is that a party claiming restitution is required to tender restoration of what it received pursuant to the contract, but the general rule may be departed from in an appropriate case. Trollop JA found as follows in *Feinstein v Niggli*⁶:

"The object of the rule is that the parties ought to be restored to the respective positions they were in at the time they contracted. It is founded on equitable considerations. Hence, generally a court will not set aside a contract and grant consequential relief for fraudulent misrepresentation unless the representee is able and willing to restore completely everything that he has received under the contract. The reason is that otherwise, although the representor has been fraudulent, the representee would nevertheless be unjustly enriched by recovering what he had parted with and keeping or not restoring what he had in turn received, and the representor would correspondingly be unjustly impoverished to the latter extent (see *Actionable Misrepresentation* (supra at

⁵ *Absa Bank Ltd v Moore* 2017 (1) SA 255 (CC) at 39.

⁶ 1981 (2) SA 684 (A) 700G – 701A.

para 294 and note 5 thereto); *Marks Ltd v Laughton* 1920 AD 12 at 21; *Harper v Webster* 1956 (2) SA 495 (FC) at 502B - D; *Van Heerden en Andere v Sentrale Kunsmis Korporasie (Edms) Bpk* 1973 (1) SA 17 (A) at 31G - 32A). But since the rule is founded on equity it has been departed from in a number of varying circumstances where considerations of equity and justice have necessitated such departure (see *Harper's* case where the cases are collected and especially at 500B, 502E)."

[15] The absence of a tender of restoration is not among the grounds of exception, so the point is not available to the excipient.⁷ It is also hard to see how the respondent could restore the occupation of the leased premises it enjoyed, so the respondent may in due course come home under an exception to the general rule.

[16] In the result, the essential factual allegations to make a case for restitution are apparent from the annexure to the third party notice, even though it is not pleaded as a claim for restitution in terms.⁸

[17] I have reservations about the respondent's claim based on the *condictio indebiti*. For one, the respondent does not plead that it made payment to the excipient under an excusable error. The respondent relies on the judgment in *Municipal Employees Pension Fund v Mongwaketse*⁹ for the submission that it need only plead that the excipient was enriched, that the enrichment was at the expense of the respondent, that the respondent was impoverished and that the enrichment was *sine causa*. However, there Wallis JA was dealing with the general requirements for the *condictio indebiti*. It does not seem to me that that judgment should be read to mean that an excusable error is not a requirement for the *condictio indebiti*,¹⁰ inasmuch as that requirement is not a general one. However, I need not decide this point either, because upholding the exception on the unjustified enrichment part of the respondent's claim would leave the claim for restitution intact.¹¹ For the same reason I need not pronounce on the

⁷ *Feldman NO v EMI Music SA (Pty) Ltd; Feldman NO v EMI Music Publishing SA (Pty) Ltd* 2010 (1) SA 1 (SCA) at 5A.

⁸ *Lillicrap Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 496G.

⁹ 2020 JDR 2838 (SCA) at 50.

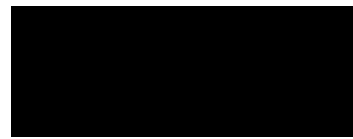
¹⁰ DP V sser "Enr chment" n LAWSA3rd ed. (2018) Vo 17 at 214.

¹¹ *Santos and Others v Standard General Insurance Co Ltd and Another* 1971 (3) SA 434 (O) 437B-E.

respondent's reliance on a negligent misrepresentation. As I found that a proper case for restitution on a fraudulent misrepresentation is apparent from the annexure to the third party notice, the reliance on a negligent misrepresentation is, for purposes of the exception, surplusage.

[18] In the result, the exception should be dismissed. There is no reason why costs should not follow the result. I make the following order:

- a. The exception is dismissed;
- b. The excipient is liable for the respondent's costs of the exception.



H A VAN DER MERWE
ACTING JUDGE OF THE HIGH COURT

Heard on: 2 October 2023

Delivered on: 11 October 2023

For the excipient:

Adv S Tisani instructed by Lawtons Inc.

For the respondent:

Adv D Aldworth instructed by Hiralall Attorney