

**IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG HIGH COURT, PRETORIA)**

**REPORTABLE**

**CASE NO: 22024/06**

**DATE: 29/4/2009**

In the matter between:

**MORGAN AIR CARGO (PTY) LTD**

Plaintiff

and

**SIM ROAD INVESTMENTS CC**

1<sup>st</sup> Defendant

**VENDITOR AFSLAERS**

2<sup>nd</sup> Defendant

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**JUDGMENT**

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**MURPHY J**

1. On 17 May 2006, Mr Jan Morgan, a shareholder and director of Morgan Air Cargo (Pty) Ltd, attended an auction where he bid and made an offer in respect of a property owned by the first defendant described as “Hoewe 35 Pomona Estates, Landbouhoewes, Pomona, Kempton Park”. Morgan signed the offer and stipulated that the purchaser was either himself or a “genomineerde.” It is the plaintiff’s case that after the auction Morgan nominated Morgan Air Cargo (Pty) Ltd, the plaintiff, as the nominee and thus purchaser of the property.

2. The auction was conducted by Mr Koop Styger, a director or employee of the second defendant, Venditor Afslaers.
3. The bid was in the amount of R2 million. In terms of the sale agreement the plaintiff paid a deposit of R200 000 to the first defendant and R182 400 to the second defendant as auctioneer's commission.
4. Immediately after the auction, which took place on the property, Morgan signed the sale agreement annexed to the particulars of claim as Annexure A. This being the offer was accepted and signed a day later by Mr Carel Moolman, the authorised representative of the first defendant.
5. It is common cause that the second defendant prior to the auction had caused an advertisement of the auction to be advertised in various newspapers in Gauteng. Several pamphlets or flyers similarly advertising the auction were available and distributed on site at the time of the auction. The relevant portion of the advertisement relating to the immovable property read as follows:

"VENDOR AFSLAERS / AUCTIONEERS, KOMMERSIële EIENDOM - POMONA (2.2 HEKTAAR), ligging: Hoewe 35, Pomona, Kempton Park. Verbeterings: Rondawel/kantoor met afskortings - onvoltooid. Omhein met beton palisade met 10 meter skuifhek. Hierdie puik 2,2-hektaar-eiendom is geleë in 'n baie gesogte gebied - bestem vir ligte industrie. Dienste beskikbaar. VOORWAARDES: Deposito 10% plus BTW. Koperskommissie: 8% (plus BTW)."

In the actual advertisement and flyers (Exhibit A1), the words “Kommersiële Eiendom - Pomona (2.2 Hektaar)” are emblazoned in white against a black background in a font larger than the font of the ensuing text. They are also underlined. Their presentation in such manner was aimed evidently at highlighting the nature, size and location of the property. The remainder of the advertisement is concerned with the sale of certain movable property such as earthmoving equipment, trucks and the like, thus having no relevance to the present dispute. The advertisement includes a small extract of a road map depicting the location of the property. It reflects that the property is on the corner of Pomona Rd and a small side road. It is in the first street a block away from the Pomona Rd intersection with the R21 highway, being the national artery that runs between Pretoria and the OR Tambo International Airport.

6. In its particulars of claim the plaintiff alleged that certain representations made in the advertisement and flyers were false in that the property is not “Kommersiële eiendom” nor is it “bestem vir ligte industrie”. In addition it is alleged that before and/or during the auction the defendants represented that the property was suitable for industrial activities and that application had been made for certain business rights and rezoning of the property. All these representations are not correct because the land is zoned as agricultural land and no application for rezoning had been done prior to the auction. The first defendant has admitted that an application for the rezoning of the property was not done and that at the time of the

sale, the property was not a property zoned as a commercial property for light industry. It is common cause therefore that the property is zoned and is restricted in terms of its title deeds for agricultural purposes.

7. The particulars go on to allege that Morgan was under the *bona fide* impression that the sale agreement was consistent with and not contrary to the advertisement and that in view of the misrepresentation, alleged to be either fraudulent or negligent, he was induced to conclude the contract and thus entitled to rescind it, claim *restitutio in integrum* and repayment of the amounts paid to the defendants as a deposit and auctioneer's commission.
8. In so far as Annexure A to the particulars of claim contains exemption clauses, in clauses 7, 8 and 18, the plaintiff contended that Morgan's supposition that the agreement was consistent with the advertisement resulted in a mistake as to the ambit of the exemption clauses and that his error in that regard was a *iustus error*, and, hence, that the defendants were not permitted to rely upon the exemption clauses to avoid the consequences of the alleged fraudulent or negligent misrepresentation.
9. The relevant exemption clauses read:

**“ 7. VOETSTOOTS**

Die eiendom word VOETSTOOTS verkoop, soos dit tans is en die AFSLAER nog die VERKOPER gee enige waarborge ten opsigte van groottes, sigbare of verborge gebreke, kwaliteit of wettigheid van verbeterings of aktiwiteite wat daarop bedryf word nie. Die eiendom word verder verkoop onderhewig aan al die voorwaardes en servitude teen die titelakte geregistreer.

#### **8. GRENSE EN BAKENS**

Die AFSLAER en VERKOPER is nie verplig om enige grense of bakens uit te wys nie, en enige beskrywing of inligting, hetsy in advertensies, katalogusse, brosjures of mondelings verskaf, word in goedertrou gedoen en die KOPER erken dat hy nie deur enige uitdruklike of stilswyende voorstellings tot die sluiting van hierdie kontrak beweeg is nie.

#### **18. WYSINGINGS EN TOEVOEGINGS**

Die bepaling van hierdie dokument behels die gehele ooreenkoms tussen die partye en geen voorlegging gemaak deur of namens die partye sal bindend wees as dit nie skriftelik tot hierdie dokument gevoeg en deur die partye onderteken is nie.”

10. Predictably, the first defendant in its plea pleaded that the express terms of the offer made by the plaintiff and accepted by it provided that the property was sold *voetstoots* and that no guarantees were given regarding the size, latent or patent defects, the quality or legality of any improvements or the activities that can be conducted on the property. Moreover, the property, in terms of clause 7, was sold subject to all the conditions and servitudes registered against the title deed of the property. It is common cause that the title deed (Exhibit A35-37) contains the following condition:

“This holding is transferred as an agricultural holding, and it may be used only for the purposes contemplated by the definition of the terms contained in the Agricultural Holdings (Transvaal) Registration Act 1919. That definition reads as follows: “Agricultural Holding” shall mean a portion of land not less than 0,8565 hectares in extent used solely or mainly for the purposes of agriculture or horticulture or for breeding or keeping domestic animals, poultry or bees.”

11. The first defendant pleaded further that the sale agreement contains all the terms of the agreement between the parties and representations by or on behalf of any party, and no representation will be binding upon any party unless made in writing and annexed to the agreement and signed by the parties.
12. Regarding the representations themselves, the first defendant put the plaintiff to the proof thereof and if proved denied they were made on its behalf or with its authority; and, in the event of the latter being established it reiterated its reliance on the “no representations” clauses in clauses 8 and 18 of the agreement.
13. Finally, the first defendant regarded the plaintiff's notice of cancellation as a repudiation which it accepted and claimed to be entitled to retain the deposit as liquidated damages in terms of clause 13 of the agreement.
14. In addition to the foregoing, the first defendant challenged Morgan's nomination of the plaintiff, and hence the *locus standi* of the plaintiff. I will

deal with the point later but before canvassing the evidence and issues relating to the alleged misrepresentation and the exemption clauses.

15. The second defendant in its plea denied making any misrepresentations and pleaded that it acted at all times on behalf of and on the instructions of the first defendant. It pleaded further that it had no knowledge of the correctness of whether or not the property was not a commercial property suited for light industry in respect of which a rezoning application had been made. It pleaded also that even if the plaintiff is entitled to restitution against the first defendant, it is nonetheless still entitled to retain the auctioneer's commission.
16. At the pre-trial conference the defendants enquired from the plaintiff if the representations referred to in paragraph 12 of the particulars of claim were made orally or in writing and, if orally, particulars were required. The plaintiff answered as follows:

“(a) Skriftelik deur die Tweede Verweerder as afslaer en agent van die Eerste Verweerder by wyse van die advertensie wat aangeheg is aan die Eiser se voorverhoorvrae. Die skriftelike voorstelling is dat die eiendom ‘n kommersiële eiendom is en dat dit geleë is “in ‘n baie gesogte gebied - bestem vir ligte industrie”.

(b) ‘n Verdere mondelingse telefoniese voorstelling is deur Mnr Koop Steyger, synde ‘n behoorlike daartoe gemagtigde werknemer van die Tweede Verweerder, aan

Jan Morgan, synde die persoon na verwys in die Eiser se Besonderhede van Vordering gemaak waartydens dit bevestig is dat die eiendom 'n kommeriële eiendom is.

- (c) Voorafgaande die veiling het gemelde Koop Steyger op 17 Mei 2006 op die eiendom mondelings teenoor beide gemelde Jan Morgan en 'n ander senior werknemer van die eiser bevestig dat die eiendom 'n kommersiële eiendom is, dat dit geskik is vir industriële aktiwiteite en dat dit daarom minstens 'n veilingprys van R2 miljoen behoort te behaal.
- (d) Alvorens die veiling gehou is, het gemelde Koop Steyger ook die inhoud van die voormelde veilingsadvertensie uitgelees en die eiendom mondelings teenoor almal teenwoordig aangebied en beskryf as 'n "puik kommersiële eiendom".
- (e) Die voorstelling van die eiendom as 'n "kommersiële eiendom" is deur alle aanhoorders daarvan en/of lesers van die advertensie redelikerwys verstaan as bedoelende dat die eiendom nie 'n residensiële eiendom is of landbougrond is nie en dat dit met ander woorde besigheidsregte het of as Aldus gesoneer is.
- (f) Tydens die veiling is voormelde interpretasie bevestig deur voubiljette wat as deel van die Verweerdere se advertensiemateriaal beskikbaar gestel is ten aansien van 'n voorgestelde "R21 corridor" van industriële- en/of besigheidsontwikkeling in die onmiddellike omgewing van die eiendom.
- (g) Duidelikshalwe en, ten einde die pleitstukke in ooreenstemming te bring met hierdie antwoorde, dui die Eiser aan dat hy van voorneme is om by die verhoor die woorde " ...geleë in 'n baie gesogte gebied..." in te voeg voor die woorde "... wat bestem is vir ligte industrie" waar laasgenoemde voorkom in paragraaf 12.1

en om die woorde "... wat bestem is vir ligte industrie..." waar dit voorkom in paragraaf 13.1 deur te haal."

17. During argument, Mr Davis SC, counsel for the plaintiff, conceded that the evidence did not support the allegations and averments made in paragraphs (b) and (d) of the plaintiff's answer to the defendant's pre-trial request for particulars. The plaintiff's case is thus that the misrepresentation was made in the advertisement and was repeated by Mr Koop Steyger on 17 May 2006 to Morgan just before the auction as well as in the flyers and advertising material distributed at the auction, from which it is contended participants in the auction would have reasonably understood that the property was not a residential or agricultural property but one which had been zoned for commercial or business purposes.
18. In paragraph (g) of the answer to the request, the plaintiff indicated that it would seek to amend its pleadings by the insertion of the words "geleë in 'n baie gesogte gebied" immediately prior to the words "wat bestem is vir ligte industrie" in paragraph 12 of the particulars. The plaintiff accepts that the advertisement did not intend to state that the property is a commercial property destined or earmarked for light industry, but rather, on a proper reading, it is intended to convey that the property is a commercial property situated in an area earmarked for light industry. The amendment sought thus aims merely to bring the pleadings in accordance with the undisputed

written contract document. The amendment also seeks consequentially to delete in paragraph 13.1 of the particulars of claim the reference to the property as being destined for light industry. The defendants were given notice of the proposed amendment prior to trial, and as there is accordingly no prejudice in bringing the pleadings into line with the evidence, the amendment may be granted.

19. The first defendant, as mentioned earlier, has placed the *locus standi* of the plaintiff in issue. Paragraph 10 of the particulars of claim reads:

“Die gemelde Jan Morgan handelend in sy persoonlike hoedanigheid het na die toeslaan van die bod op die veiling die Eiser, Morgan Air Cargo (Pty) Limited, genomineer as koper in terme van die bepalings van **Aanhangsel “A”** welke nominasie deur die Eiser aanvaar is op of ongeveer 17 Mei 2006. ‘n Afskrif van die skriftelike nominasie word hierby aangeheg as synde **Aanhangsel “B”**.”

The first defendant pleaded to this in paragraph 6 of its plea by stating that it had no knowledge of the allegations, did not admit the same and put the plaintiff to the proof thereof. The second defendant in paragraph 10 of its plea admitted the allegations. There is a measure of inconsistency in the first defendant’s plea in that it appears to admit in paragraph 4.3 of its plea that Morgan made the offer he did, as averred in paragraph 6.1 of the particulars of claim, “in sy persoonlike hoedanigheid of namens ‘n genomineerde”. Be that as it may, Mr Bruwer, counsel for the first defendant, persisted in argument with the contention that the plaintiff had

not discharged its onus to prove that a nomination of the plaintiff as purchaser had occurred.

20. Annexure B to the particulars of claim, alluded to in paragraph 10 thereof, reads as follows:

**"MORGAN AIR CARGO (PTY) LTD  
REGISTRASIENOMMER: 2003/008869/07**

**AANVAARDING VAN NOMINASIE**

Ek die ondergetekende,

**PETRUS JANSE VAN VUUREN**

In my hoedanigheid as Algemene Bestuurder van Morgan Air Cargo (Pty) Ltd, behoorlik bevoeg en gemagtig daartoe aanvaar hiermee namens Morgan Air Cargo (Pty) Ltd die nominasie van Jan Morgan vir die koop van Hoewe 35, Pomona Estates, Landbouhoewes IR, Munisipaliteit van Groter Oos-Rand Metro, Gauteng beter bekend as Hoewe 35, Pomona Estates, Landbouhoewes Pomona, Kemptonpark.

ALDUS GEDOEN en GETEKEN te **KEMPTONPARK** op hierdie **17de** dag van **Mei 2006**.

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**PETRUS JANSE VAN VUUREN  
(Behoorlik daartoe gemagtig)"**

21. It was submitted on behalf of the first defendant that the relevant witnesses, Morgan and van Vuuren, were vague as to what they did to effect the nomination. Annexure B is admittedly unusual in that it does not overtly appear to be a nomination of the plaintiff by Morgan. It is rather a document in the name of the plaintiff in which van Vuuren, the general manager of the plaintiff, accepts the nomination of Jan Morgan to purchase the property. Whatever the unusual forum of the document, if one reads it together with the sale agreement it is quite evident that the intention was for the plaintiff to become the “genomineerde” referred to in the sale agreement. Morgan testified that when he signed the contract he communicated to the female assistant who was processing the documentation as follows:

“Ja, ek het vir haar gesê ek weet nie of dit in my persoonlike naam gaan wees en of ons 'n maatskappy wil gebruik nie.”

Later he went on to say that he purchased it and later nominated the plaintiff. He referred to Annexure B (also Exhibit A14) and said:

“Dit is waar ek vir Petrus sê dat hy, ons doen dit in, waar ek vir hom sê ons doen dit nou in Morgan Air Cargo se naam en hy moet vir my die tekenwerk doen.”

He confirmed that van Vuuren signed as the authorised representative of the plaintiff.

22. Under cross-examination Morgan appeared to contradict himself by saying that at the time he signed Annexure A, he did not know whether or not he would put the property into the name of one of his companies. I do not think too much should be made of that. His evidence in cross-examination that he intended to discuss the matter first with his auditors is obviously consistent with the fact that he signed the agreement alternatively in his personal capacity or on behalf of a nominee. Mr Bruwer's submission that Morgan himself was the purchaser and that the plaintiff sued because it had put up the money (without having been nominated) was directly countered by Morgan in his evidence. He testified that the plaintiff would have been the company managing the warehouse intended for the property. The land was required for warehousing goods for export via the airport. Thus, the probabilities support the conclusion that the plaintiff was nominated. The following exchange took place during cross-examination:

*Counsel:* Sê vir sy Edele as die koop deur gegaan het, dan sou dit in die naam van Morgan Air Cargo gewees het, is dit reg?....

*Morgan:* Ek weet nie watter strik u my wil in lei nie, maar ek bedoel as die transaksie, as ons die plek gebou het en ons kliënt daar in gesit het, dan sou die eiendom in Morgan Air Cargo gewees het.

He went on to say that given the plaintiff's intended future involvement it was logical that the property would be in its name. That is why it (rather than he) paid the commission and deposit the day after the offer was

made. Accordingly, despite the somewhat vague account of how and when the nomination occurred, and van Vuuren's initial mistaken statement that Morgan nominated him (qualified in the final analysis by the wording of Annexure B which manifestly did so in his representative capacity as the general manager of the plaintiff), I am satisfied that a proper nomination occurred and that the plaintiff has the necessary *locus standi*.

23. I turn now to consider the evidence and issues related to the alleged misrepresentation and the exemption clauses.
24. Morgan, the sole shareholder and sole director of the plaintiff at the time of the transaction, testified that the plaintiff was in the business of airfreight. At that time the plaintiff had access to another property in the same vicinity which was also close to the airport. However, that property did not have business rights and hence was unsuitable for building and operating a warehouse; something the plaintiff intended to do for its own purposes and on behalf of clients. The plaintiff was accordingly on the look out for a suitable alternative and van Vuuren had been instructed to secure another property. Morgan and the plaintiff were clearly in the market for commercial property and their interest was evoked by that description in the advertisement. As Flemming DJP said in *Muller v De Wet NO and Others* 2001 (2) SA 489 (W) at 495D:

"If there is any sense in advertising, it rests upon the prospect of evoking interest in that which is mentioned in the advertisement."

25. In response to the advertisement, Morgan phoned Mr Koop Steyger, the director of the second defendant whom he knew by reputation. Steyger informed Morgan that he would conduct the auction personally. On the morning of the auction, before the bidding began, Morgan again spoke to Steyger, this time in person, and conveyed to him the plaintiff's intention to erect a warehouse on the property. They discussed the likely price the property could fetch and agreed it would be in the region of R2million, which Morgan considered fair for a commercial property of that extent and at that location. At no stage during this conversation, according to Morgan, did Steyger communicate that the property would be unsuitable for erecting a warehouse on account of it being zoned for agricultural purposes. Despite Steyger being present in court throughout the trial, he elected not to give evidence and hence Morgan's evidence regarding this conversation between them is uncontested and not contradicted by any other testimony
26. Prior to the commencement of the bidding, as is customary in auctions of this kind, some conditions of sale were read out. As I understand the case for the defendants, they allege that the entire document containing the contractual terms (Annexure A) was read out over a public address system by the auctioneer who was seated in a small rondawel that served

as an office on the day of the auction. The auctioneer was presumably out of view of the bidders who were assembled on the property, like Morgan, outside the rondawel. Morgan testified that he did not listen or pay much heed to what was read over the public address system. However, the auction itself was held later outside the rondawel and at that stage Morgan moved forward and stood in close proximity to the auctioneer.

27. Morgan testified that at no point during the auction did Steyger explain that the property was not commercial property. As mentioned, flyers confirming the advertisement were distributed and available on site that advertised the property as a commercial property.
  
28. Morgan's claim that Steyger never corrected the representation of the property as commercial property was disputed by the defendant's witnesses. Morgan described how before the auction commenced Steyger welcomed the son of the seller and announced his presence to the bidders. Morgan went on to say:

"Ek kan nie onthou wie dit was nie, ek kan net onthou dit was 'n man gewees, en dit is nog te meer vir my, die papiere het daar orals rond gelê wat op die advertensie staan en seersekerlik sou ek gegloo het as die verkoper gesien het daar staan kommersiële eiendom, ek bedoel dit het daar orals rond gelê. Jy moet regtig met toe oë rondloop as jy dit nie raakgesien het nie, want daar was borde op gewees ook

aan die kant, dan glo ek hy sou dan ten minste kon hy maar net vir die afslaer gesê het, hoor hierso maar hierdie is nie kommersiële eiendom nie.”

In response to this statement it was put to Morgan by counsel for the first defendant that the conversation could have been made but because he was not listening he might not have heard it. To which Morgan conceded that it might have been said, but he doubted it. Then, during cross-examination by Mr Maritz, counsel for the second defendant, it was put to Morgan that Steyger would testify that after reading the terms and conditions of sale he allowed question time, an opportunity for bidders to clear up any uncertainty regarding the property, and that during that time one of the bidders asked a question regarding the zoning of the property to which Steyger replied it was agricultural property. Morgan adamantly denied this, saying:

“Verseker nie, dit kan ek kategories vir jou sê. Ek het naby hulle gestaan, dis verseker nie gesê nie.”

29. As it turned out, Steyger did not testify and thus did not back up the assertion made on his behalf. The son of the seller's sole member, Mr Johan Moolman, did however testify. He had also been present in court when Morgan testified. His evidence in respect of the question asked is at variance with the assertion put to Morgan during cross-examination. Asked by Mr Bruwer during his evidence in chief whether bidders had asked questions, Moolman replied:

“Daar was enkele vrae gewees. Daar was ‘n vraag gewees oor die hersonering *waarin ek* geantwoord het, dit is gesoneer as ‘n landbouhoewe.”

Earlier in his testimony Moolman claimed that Steyger also had announced to the bidders before the auction began that the property was being sold as an agricultural holding. He could offer in cross-examination no satisfactory explanation for why this proposition (that an announcement had been made) had not been put to Morgan. Sabine Lehmacher, who testified on behalf of the first defendant, also claimed, contrary to what she had intimated during her evidence in chief, that she heard Steyger make the announcement. None of the pre-trial correspondence makes any reference to either the question posed and answered by Steyger or Moolman, or the alleged pre-auction announcement by Steyger.

30. Whether or not the alleged question was asked and answered, and whether or not the alleged announcement was made prior to the bid, are matters of obvious relevance and significance to which I will revert later. Associated with them is the further question of whether such answer and announcement, if made, would have been sufficient to correct the false impression created by the newspaper advertisements and the flyers and placards displayed at the auction.

31. When Morgan's bid was accepted, he went to the rondawel to sign the paper work. He conceded that he did not read the terms and conditions of sale properly but merely scanned them, looking primarily at headings of the various clauses. Thus he neither listened to the terms and conditions when read out, nor did he read them thoroughly before signing. He was consequently not acquainted with the content and import of the exemption clauses contained in the contract, namely clauses 7, 8 and 18.
32. After conclusion of the sale, (acceptance by the first defendant), the plaintiff approached town planners who advised that the property was zoned only for agricultural purposes and that there was a prohibition against rezoning it. Morgan testified that had he known the property was not a commercial property and could be used only for agricultural purposes, he would not have attended or bid at the auction and the plaintiff would not have purchased the property. His rationale for attending the auction was to overcome the difficulty the plaintiff faced because the property it occupied did not have business rights. He added that even if the property had been capable of being rezoned he would not have bid at the auction because of the cost and the time delay involved in a rezoning application. He needed the property at the earliest opportunity.
33. Finally, in relation to the exemption clauses, particularly the *voetstoots* clause, Morgan indicated that he accepted such would have operated normally had the property been a commercial property, but insofar as he

considered them when scanning the document before signature, he would not have understood them to exclude his right to rescind the contract on the grounds that the *res vendita* had been misrepresented as commercial land when it was in fact agricultural.

34. During the cross-examination of Morgan the defendants made the point, with reference to correspondence directed on his behalf by his erstwhile attorneys, that the initial complaint was not about the land being zoned agricultural but rather that the plaintiff was unable to rezone it and obtain business rights. The aim of this line of questioning was to show that Morgan must have in fact known that the property was agricultural when he signed the offer to purchase and accordingly that the sale was not induced by any material misrepresentation as regards the zoning of the property. The first letter to which counsel referred was that dated 23 May 2006 (less than a week after the contract was concluded) addressed by the plaintiff's attorney to the second defendant - Exhibit A17. It reads:

"KOOPOOREENKOMS: HOEWE 35, POMONA ESTATES, LANDBOUHOEWES, POMONA, KEMPTON PARK (MORGAN AIR CARGO (PTY) LTD: KOOPER // SIM RD INVESTMENTS CC: VERKOPER)

Ons verwys na bovermelde en bevestig dat ons optree namens Morgan Air Cargo (Pty) Ltd, die koper in bogemelde transaksie.

Dit is ons instruksies dat ons kliënt op 17 deser en per openbare veiling 'n aanbod gemaak he tom die bogemelde eiendom te koop welke aanbod, ons verstaan, intussen deur die verkoper aanvaar is.

Dit het intussen tot ons kliënt se kennis gekom dat die gemelde eiendom uitsluitlik vir landbou gesoneer is en dat daar hoegenaamd geen kans bestaan dat die eiendom hersoneer kan word na Ligte Industrie of and Besigheidsgebruik nie.

Die probleem met die hersonerings kwessie is deur Gautrans aan ons kliënt geopenbaar en is daar deur Gautrans tydens 'n vergadering met ons kliënte bevestig dat die eiendom nie hersoneer kan word nie as gevolg van die bou aan beoogde padnetwerke. Hierdie inligting moes te alle relevante tye aan die verkoper bekend gewees het.

Onder omstandighede waar die eiendom aanvanklik bemark is as 'n "kommersiële eiendom" wat "bestem is vir ligte industrie" vind ons kliënt die toedrag van sake onaanvaarbaar.

Onder die omstandighede waar daar dan 'n wanvoorstelling aan ons kliënt gemaak is en op sterkte van welke wanvoorstelling ons kliënt die koopkontrak gesluit het, is dit ons instruksies om u mee te deel dat dit ons kliënt se voorneme is om nie met die kooptransaksie voort te gaan nie. Onder die omstandighede versoek ons dan dat u aan ons kliënt sal terugbetaal die bedrag van R382,400,00 synde die 10% deposito, 8% kooppryskommissie en 14% BTW op kooppryskommissie binne 3 dae vanaf datum van hierdie skrywe.

Voorts is dit ons instruksie om u mee te deel dat ons kliënt sy spyt uitspreek oor die wending wat die aangeleentheid nou geneem het en wil ons kliënt dit ook duidelik maak dat hy nie u, Venditor-afslaers, kwalik neem vir die wanvoorstelling wat

gepleeg is nie. Ons kliënt aanvaar u werk op instruksies van die verkoper wat u ten volle in die prentjie moes plaas, spesifiek wat betref die verbod op hersonering, welke inligting sonder twyfel tot die verkoper se kennis moes strek.

Onder die omstandighede verneem ons dringend van u.”

A second letter, Exhibit A19, was addressed on 25 May 2006 to the first defendant's attorneys which reads as follows:

“KOOPOOREENKOMS: HOEWE 35, POMONA ESTATES LANDBOUHOEWES,  
POMONA, KEMPTON PARK

Ons tree hierin op namens Morgan Air Cargo (Pty) Limited.

Dit is ons instruksies dat ons kliënt op of omtrent 17 Mei 2006 per openbare veiling, gehou deur Venditor Afslaers, 'n aanbod gemaak he tom die bogemelde eiendom van u kliënte te koop, welke aanbod deur u kliënte aanvaar is.

Ons kliënt he took intussen voortgegaan om 'n bedrag van R382 400,00 te betaal ten opsigte van die 10% deposito asook die 8% kommissie tesame met BTW.

Voorafgaande die veiling is die eiendom deur Venditor Afslaers, as synde agente van die verkoper, geadverteer en bemark as 'n “kommersiële eiendom” wat bestem is vir “ligte industrie”.

Tydens die veiling wat plaasgevind het, het Venditor Afslaers, as synde u agente, ook aan die voornemende kopers, wat natuurlik ons kliënt insluit, voorgehou dat die eiendom geskik is vir industriële aktiwiteite en dat u kliënt reeds aansoek gedoen het

vir sekere besigheidsregte. Hierdie voorstelling het ons kliënt oorreed om 'n aanbod te maak welke aanbod dan deur u kliënt aanvaar is.

Dit blyk nou volgens ons kliënt se ondersoek dat hierdie voorstellings wat aan ons kliënt gemaak is in alle opsigte vals was deurdat daar nou vasgestel het dat die relevante owerhede onder geen omstandighede 'n hersonering van die eiendom sal toelaat nie. Hierdie eiendom vorm, volgens ons ondersoek, deel van die eiendomme wat affekteer word deur beoogde pad-netwerke en derhalwe die weiering om die eiendom te hersoneer. Hierdie feite was te alle relevante tye binne die kennis van u kliënt.

As dit nie was vir die wanvoorstelling wat aan ons kliënt gemaak is nie, sou ons kliënt onder geen omstandighede bereidwillig gewees he om 'n aanbod ten opsigte van die eiendom te maak nie en stel u kliënt se wanvoorstelling derhalwe 'n wesenlike wanvoorstelling daar. Hierdie wanvoorstelling word uit die aard van die saak nie gedek deur die voetstoots-klausule soos wat dit in die koop-ooreenkoms gevind word nie en plaas ons hiermee op record dat ons kliënt nie bereid is om met die transaksie voort te gaan nie en derhalwe die koop-ooreenkoms wil kanselleer.

Vir wat dit werd is maan ons u kliënt hiermee formeel aan in terme van klausule 13 van die koop-ooreenkoms om die kontrakbreuk en/of wanvoorstelling reg te stel binne 7 (sewe) dae vanaf datum hiervan ten einde te voldoen aan die bepalings van die koop-ooreenkoms. Indien ons nie binne 7 (sewe) dae vanaf u verneem dat die eiendom wel geskik is en hersoneer kan word vir die doel soos wat dit geadverteer en aan on kliënt wanvoorgestel is nie, sal ons kliënt onmiddellik voortgaan om die ooreenkoms te kanselleer en terugbetaling tee is van die bedrag van R382 400,00 soos reeds aan u en Venditor afslaers oorbetaal.

Ons stel voor daar word dringend 'n rondetafelgesprek gehou en word al ons kliënte se regte voorbehou.

Ons verneem graag van u.”

35. Morgan did not concede that the formulation of the demands by his attorney could be interpreted to suggest that his instructions were that the defendants had merely misrepresented the prospects of an application for rezoning. He, however, construed the letter as an attempt to bring about a favourable result either in the form of the property being rezoned, or, failing that, *restitutio in integrum*.
36. Mr van Vuuren testified that he accompanied Morgan to the auction. He confirmed that he had been instructed to find a commercial property and that he had brought the advertisement to the attention of Morgan. He knew that they required the property for the purpose of erecting a warehouse upon it. It was put to him during cross-examination that he had told Sabine Lehmacher after the dispute arose that he was in trouble for not having done his homework by checking the zoning of the property. He had no recollection of this and only remembered phoning Lehmacher to tell her he was upset that the property was not a commercial property.
37. The first defendant called two witnesses: Mr Johan Moolman and Ms Sabine Lehmacher. The second defendant closed its case without leading any evidence.

38. Johan Moolman is the son of Mr Carel Moolman, the sole member of the first defendant, the seller, who is described in the sale agreement as the “gevolmagtigde van die firma Sim RD Inv CC handelende in sy hoedanigheid as eienaar “ of the property. Mr Carel Moolman, who issued the instructions to the auctioneer to sell the property, did not testify.
39. Johan Moolman testified that he attended the auction on 17 May 2006 and was present from the beginning until the sale of the property. When asked to describe what he heard, what the auctioneer said and what happened at the auction, he replied that about 2 hours before the auction commenced it was announced to the bidders then assembled that the title deed was available for anyone to inspect. Morgan's uncontested evidence was that he and van Vuuren arrived about one hour before the auction. They consequently would not have been present when the invitation was made to the bidders to inspect the title deed. Before the auction began, according to Moolman, Steyger read out the terms and conditions and then said, as Moolman put it:

“Menere julle het julle vergewis met die eiendom en julle het julle huiswerk gedoen op die eiendom en die eiendom word as ‘n landbouhoewe verkoop.”

Counsel then asked him whether any questions were asked to which Moolman tendered the answer mentioned earlier that some questions

were asked, and that there was one question about the zoning which he (and not Steyger) answered to the effect that the land was zoned as agricultural.

40. Moolman did not sign the agreement upon behalf of the first defendant at Kempton Park. Nor did he take the written offer made by Morgan to his father at Bela Bela. Instead Sabine Lehmacher drove to Bela Bela the next day and presented the offer to his father for signature.
41. Moolman initially said he was not present when his father telephonically gave instructions to the second defendant to auction the property. Nonetheless, he volunteered, his father had discussed the call with him afterwards, mentioning to him that the property was contemplated for business rights but remained agricultural. On 17 April 2006 he had a discussion with Ms Lehmacher on the telephone, during which he furnished her with information regarding the property, including the extent of it and the details of the owner and seller. Under cross-examination by counsel for the second defendant, he again stated that he had answered the question from one of the bidders regarding the zoning of the property.
42. Under cross-examination by counsel for the plaintiff, Moolman elaborated on how the instruction to sell the property came about. As just mentioned, he had initially said (during cross-examination by counsel for the second defendant) that he was not present during the first phone call between

Lehmacher and his father but that the conversation was discussed with him after the telephone call. When counsel for the plaintiff questioned him, the story changed significantly. He explained that the second defendant had contacted his father on seeing a “for sale” sign on the property and requested permission to auction the property. When it was put to him that his relaying of the telephone conversation was hearsay, he replied (contrary to what he had said earlier) that he had walked into his father’s office while the conversation was under way and thus heard his father’s side of the conversation. His father agreed to sell the property on condition that the second defendant bore the advertising costs. This last proposition is inconsistent with the common cause fact that the second defendant deducted approximately R44 000 from the deposit for advertising costs.

43. Moolman further confirmed that on 24 April 2006 he sent a fax (Exhibit A5) to Lehmacher confirming the details of the property. The letter furnishes a description of the plot as: “Plot 35 Pomona Estates A/H” and provides information about the size, the owner and its VAT registration number. Nothing is stated overtly about the zoning of the property, though A/H could have been interpreted to mean: Agricultural Holding. This latter aspect was not explored in questioning.
44. Moolman testified that he had not seen the advertisement of the auction published in the newspapers. However, he conceded that he saw the

flyers when he arrived at the auction and noted that they said nothing about the zoning of the property as agricultural. He went on to say:

“Dit is reg. En voordat die veiling begin het met hierdie wat ek daar gesien het, het ek aan Sabine duidelik gesê maak dit duidelik vir die mense dat hierdie is ‘n landbouhoewe, hy is nie gehersoneer nie. Hy word verkoop as ‘n landbouhoewe.”

My impression is that Moolman intended to convey that this instruction is what led to Steyger allegedly making the announcement before the auction commenced.

45. Moolman was unable to give any explanation why his version of the alleged announcement and his answering the question had not been put to either Morgan or van Vuuren before the closing of the plaintiff's case. He confirmed that he and Steyger had attended the trial, had been present when the plaintiff's witnesses gave their testimony and did not deny that he and Steyger had been in conversation. He was furthermore unconvincing when asked to explain the reaction of the bidders who had come to purchase commercial property when told that the property was not commercial but in fact agricultural. The probabilities are that the bidders would have been aggrieved. Moolman's answers to the questions posed in that regard were mostly non-responsive and evasive. His testimony is also inconsistent with the content of a letter addressed to the plaintiff's attorney by the first defendant's attorney dated 1 June 2006

(Exhibit A 25) in response to the letter of 25 May 2006 (Exhibit A 19). In the latter letter it was particularly stated on behalf of the plaintiff that the property was advertised and marketed before the auction as commercial property destined for light industry and further that during the auction the auctioneer represented that the property was suitable for industrial activities and that the seller had made application for business rights. Had the announcement been made and the bidder's question about zoning been answered by Moolman as said, the appropriate response would have been to refer to the announcement and answer. Instead in Exhibit A25 the first defendant's attorney, acting on the instructions of his client, replied:

“Ons Kliënt dra geen kennis daarvan dat die eiendom as kommersieël of industrieel bemark is, of dat dit enigsins voorbehou is as geskik vir industriële aktiwiteite, besigheidsregte of enige ander doeleindes anders as landbou nie, of dat beweer is dat ons kliënt reeds aansoek gedoen het vir besigheidsregte nie. Intendeel was ons kliënt se spesifieke instruksie dat die eiendom voetstoots verkoop word as landbouhoewe. Ons kliënt ontken dus dat daar enigsins wesenlik of andersins enige wanvoorstelling teenoor u kliënt gemaak is.”

Moolman could give no explanation for this contradictory and inconsistent statement, nor any explanation for why the announcement had not been raised with the plaintiff at any stage by anyone prior to his giving testimony in court on behalf of the first defendant.

46. Moolman could also not explain where the description of the property as commercial property came from, despite Steyger in a letter dated 8 June 2006 addressed to the first defendant's attorney (Exhibit A28) stating as follows:

"In paragraaf 2 spreek u u kliënt se onkunde rakende die bemarking van die veiling uit. Ons plaas op record dat ons nie enige inligting rondom die eiendom self nagevors en bekom het nie, maar alle inligting vanaf u kliënt verkry is."

It is also notable that Steyger made no mention in this letter of the alleged fact that he had announced to the bidders that the property was agricultural, as one might have expected, considering that he was responding to the suggestion in Exhibit A25 that he had acted contrary to the first defendant's instruction to sell the property as an agricultural holding.

47. The first defendant also led the evidence of Sabine Lehmacher who was employed as a "veilingsagent en eiendomsagent" by the second defendant at the time of the auction. She testified that she had obtained instructions to proceed with the sale of the property from Mr Carel Moolman. She made a contemporaneous note in her diary of a telephone call between herself and Carel Moolman on 17 April 2006. The relevant note is recorded in Exhibit A4, being the page of her diary for 17 April 2006. The note reads:

"Karel. Erf 35 Pomona. Sim Rod Invest (Pty) Ltd was written but then deleted) CC.  
 ... very popular area. 1.8/2.2 ha omhein met sementmuur. Soneer  
 landbou/kommersieel. Geormerk ligte industry. Nie water nie - dienste beskikbaar  
 ... Water aansluit - aansit ... Karel Jacobus Moolman volspoed."

Thus, contrary to the first defendant's plea denying that the second respondent made the representations on behalf of it, Lehmacher in effect testified that she had. She also confirmed that the information had come from Carel Moolman. She had specifically contacted him, as she put it:

"om die bewoording te kry vir die advertensie en wat ek hier neergeskryf het is die inligting wat ek by mnr Carel Moolman gekry he tom die advertensie te kan plaas."

She stated in cross-examination that the word "kommersieël" came from Carel Moolman. As I have said, Carel Moolman did not testify and this evidence therefore stands uncontradicted.

48. During the course of her evidence in chief, Exhibit E, which had only been discovered the previous day, was admitted into evidence without objection. The document is a handwritten note on the back of an inventory. The note reads:

"082 5555 756 Karel - Dienste beskikbaar. Krag en riool beskikbaar. Water reeds aangesluit. Verkoop as landbougrond/hoewe. Klient moet self aansoek doen vir regte."

No explanation was offered for the late discovery of this note. Nor is there any account of its immediate provenance. Asked by counsel where it came from, Lehmacher replied:

“Ek het hierdie nota vir Koop Steyger gegee voor die veiling net ingeval daar vrae sou gewees het en om seker te maak dat hy dit noem voor die veiling.”

When asked where she had obtained this information, she replied that it was her own information. Counsel endeavoured to prompt her to corroborate Moolman's testimony that he was the person who had warned her to correct the false information in the flyers. He asked her if she knew Moolman, to which she replied affirmatively and that she had met and spoke to him at the auction. She did not however testify that he had instructed her to correct the false impression created by the flyers.

49. When asked if she was present during the auction, and when “die aankondigings gedoen is en die voorwaardes gelees is” she replied:

“Ek was nie in perseel, in die kamer nie, maar ek was op die perseel, ek was besig met die los bates.”

In other words she was on the property but busy with other work.

50. Counsel for the second defendant sought direct corroboration of Moolman's alleged instruction to her to correct the false impression created by the flyers by telling her what Moolman had testified. She responded that she was unable to remember the conversation. However, she testified that she heard Steyger read the terms and conditions over the public address system from within the rondawel while she was outside. She then also stated that he had mentioned that the property was agricultural and that the client would have to apply for business rights. The impression so created was that Steyger made the announcement from within the rondawel which is at variance with the scenario sketched by Moolman that Steyger did so just before commencing the bidding, which would have been outside the rondawel. She reiterated in cross-examination that she heard the announcement over the loudspeakers.
51. Lehmacher conceded during cross-examination by counsel for the plaintiff that the advertisement simply referred to the property as a commercial property without any indication of its sole zoning for agricultural purposes. She disingenuously sought to rely on the reference in the advert to "Hoewe 35" (the address) as a clear indication of its agricultural nature. The submission holds no water and frankly redounds negatively upon her credibility, especially in the light of her subsequent reluctant concession that a "hoewe" could be zoned for commercial rights.

52. In further cross-examination she ventured that she wrote the note to Steyger, not because of Johan Moolman's instruction to her to correct the flyers but because she had received telephone calls from potential buyers prior to the auction and had checked the title deeds. If that were so, it begs the question why the second defendant, fully aware of the agricultural zoning prior to the auction, would continue to distribute flyers on the day of the auction that the property was commercial. Lehmacher readily admitted that she had become aware that the property was not zoned commercial when she obtained the title deeds some time before the auction and realised that Carel Moolman had given her incorrect information on 17 April 2006. She distanced herself from responsibility by claiming that the flyers were distributed by Moolman and not the second defendant on the day of the auction. Her testimony contradicts Moolman who created the impression that he approached her to correct the misrepresentation because he saw what was written in the flyers. She conceded though that the second defendant had taken no steps to put up any placard or notice correcting the false impression created by the advertisement and flyers that the property was a commercial property when she knew or understood that it was not such.
53. The second defendant did not lead any evidence. It is common cause that Steyger was present in court throughout the trial and thus heard the entire testimony of all the other witnesses.

54. The plaintiff's cause of action is that it was induced to enter into the sale agreement by a material misrepresentation entitling it to resile from the agreement and to claim restitution. It claims further that by virtue of an *iustus error* following from the misrepresentation it is not bound by the terms of the contract, including the clause exempting the seller from liability for misrepresentation.
55. I am satisfied on the basis of the evidence adduced on behalf of the first defendant that the second defendant on the instructions of the first defendant represented in the newspaper advertisements and in placards on the day of the auction that the subject property was a commercial property. All the witnesses, except Lehmacher, seemed to suggest that the defendants together caused the representation to be made again through flyers distributed at the auction. Lehmacher as just explained testified that the flyers were distributed by the first defendant alone. Whatever the case, one may safely conclude that the representation was made in the various forms by the second defendant on behalf of the first defendant or by the first defendant itself. If such were indeed misrepresentations then the plaintiff will be entitled to rescind the contract and claim restitution.
56. The question then is whether the representation of a property exclusively zoned as agricultural property with no prospect of either being zoned commercial or being granted business rights, as a "commercial property"

constitutes misrepresentation. The statement that the property was commercial was made in the advertisement, poster or flyer alongside the description of the area where it is situated as “bestem vir ligte industrie”. There is no evidence that Steyger ever confirmed the representation in the advertisement either telephonically or during his undisputed conversation with Morgan before the auction. Nor is there any evidence to support the allegations made in the pleadings and correspondence that Steyger confirmed that the property was “’n Kommersiële eiendom ... dat geskik is vir industriële aktiwiteite”, or that he referred to it as “’n puik Kommersiële eiendom.” I accordingly accept that the only evidence of any positive representation about the nature of the property is that in the advertisement, placard and flyers.

57. In addition to that there is the conversation that took place between Morgan and Steyger in person on the morning of the auction. Morgan had telephoned Steyger and established that he would conduct the auction personally. He informed Steyger that he would see him at the auction. Morgan arrived an hour before the auction. He walked around, noticed the flyers and posters containing the advertisement, saw Steyger and approached him. When asked what he told Steyger, Morgan said:

“Vir hom vertel wat ek wil doen. Vertel vir hom dat ek het ‘n, ons wil baie dringend ‘n warehouse opsit vir een van ons kliënte. Ook vir hom gesê dat ons het ‘n perseel gehad nie vêr hiervandaan af nie waar ons nie regte het nie, en baie opgewonde hier

is nou 'n perseel en as ons die koop kan, as ons die eiendom in die hande kan kry, dan kan ons begin om om, om 'n gebou op te sit."

When asked what Steyger said in response, Morgan said:

"ons het daaroor gesels".

This evidence has not been contradicted.

58. In other words, in addition to the positive representation of the property as commercial, there is the omission by Steyger to disclose that the property was zoned agricultural and did not have business rights. If Steyger was aware that the property was not zoned commercial, which for reasons that follow I consider doubtful, he may well have had a duty to disclose that during his conversation with Morgan who for understandable reasons was labouring under the impression that it was commercial - see *Du Toit v Atkinson Motors Bpk* 1985 (2) 893 (A) at 905D. One must accept, on the basis of Lehmacher's evidence, her diary entry, and the content of the advert, that the second defendant originally thought the property was commercial. Hence, any change in that supposition before the auction gave rise to a duty to disclose and any silence on the part of a knowing Steyger would have constituted a misrepresentation by silence - *Cloete v Smithfield Hotel (Pty) Ltd* 1955 (2) SA 622 (O) at 626-627. In the absence of contrary evidence from Steyger himself, he either unwittingly persisted in the misrepresentation reflected in the advertisement or misrepresented the true situation through his silence. As will become clearer later, I

incline to the view that Steyger probably thought the property was zoned commercial. This, if anything, is reinforced by his undisputed failure to put Morgan right during their conversation before the auction began.

59. Mr Maritz, however, in addition argued that the plaintiff failed to establish that the representation constituted a representation of fact that was wrong or false. First of all, he submitted, a description of the area as “bestem vir ligte industrie”, does not indicate that the property itself had been zoned for light industry but might indicate that re-zoning had yet to occur. To my mind the use of the word “bestem” says nothing about zoning or the use rights attached to the property. Rather, along with the use in the advertisement of the phrase “baie gesogte area”, it projects an image that the area was undergoing change. The description of the property as “n Kommersiële eiendom” in such an area, in my opinion, would posit in the mind of the reasonable buyer the idea that the property in question had already been zoned or approved as commercial in an area where the other properties were likely in the future to be favourably considered for rezoning for light industry. To the extent that the description of the area involved an element of speculation or prophecy about the future of the area, such did not qualify the stated nature of the property itself, which was expressed unequivocally to be presently commercial in an area previously otherwise, but likely to change, like the subject property, for use as an area for light industry. Where a seller makes a representation or an assertion of a positive and material fact in regard to the quality and

possible uses of the *merx*, such conduct approximates a warranty or undertaking, which in appropriate circumstances could give rise to remedies other than *restitutio in integrum* - *Corbett v Harris* 1914 CPD 535 at 543. But whatever the remedy sought, having regard to the language used in the advertisement and the circumstances in which it was used, a reasonable person in the position of the plaintiff would have understood the defendants to have represented as a statement of fact that the property was suitable and immediately available for commercial purposes - see *Petit v Abramson (II)* 1946 NPD 673 at 682.

60. Mr Maritz contended also that the description of the property as “n Kommersiële eiendom” did not in any event represent that the property had “besigheidsregte”. The term, it was submitted, is a vague and generic term for a number of species of business rights, not all of which might suit the plaintiff’s purposes. The point, it seems to me, goes to the question of materiality. Before an innocent party may resile from a contract on the grounds of misrepresentation, the incorrect statement of fact must be material. The question is then whether a reasonable person in the position of the plaintiff objectively would have believed the description of the property as commercial meant that it had business rights permitting the plaintiff to engage in the activities it envisaged. The word “commercial” is indeed a word of wide connotation, meaning “concerned with or engaged in commerce”, which is the activity of buying and selling. But in the context in which the phrase appeared in the advertisement,

referring as it did to land, the word must be given a more restricted meaning by contrasting it to other land uses, such as agricultural or residential. Land is used for commercial purposes when the activities upon it involve the exchange, distribution and merchandising of goods. The erection of a warehouse for conducting the business of importing and exporting agricultural products, which the plaintiff had in mind, would entail utilising the land for commercial purposes - see *Benrose Holdings Ltd v Flamingo Laundries and Another* 1978 (2) SA 377 (W) at 380B. The description of property as commercial therefore, in my judgement, represented that the land was suitable, zoned and authorised for that or other commercial purposes. The evidence of all the witnesses established beyond doubt that the land was not so zoned. Indeed the first defendant admitted that no application for rezoning the property was done prior to the auction and that the property is not and never has been zoned as a commercial property for light industry. While it is correct that the allegation that the property could not be rezoned in the future is hearsay, common sense tells us that had rezoning been possible this litigation would not have commenced, or at least not have taken the course it did.

61. In the result, therefore, I am satisfied that the defendants' representation of the property as a commercial property when it was zoned exclusively agricultural constituted a material misrepresentation.

62. The *prima facie* evidence of Morgan and van Vuuren that the misrepresentation induced the contract is undisputed. They sought out a property with commercial rights precisely because the property they occupied was unsuitable for commercial purposes. However, a person to whom a misrepresentation has been made and then acquires knowledge of the misrepresentation before the contract is concluded cannot claim to have been induced by the misrepresentation. Mr Bruwer has argued that Morgan was not induced to conclude the contract by reason of the misrepresentation. He contended that the probabilities point to Morgan having been aware of the agricultural zoning at the time he signed the offer and that he persisted in the optimistic hope (on the basis of a different misrepresentation perhaps) that there would be no difficulty in rezoning the property. This line of argument necessitates the investigation of two issues: firstly whether or not there was a public announcement prior to the bidding that the property was not a commercial property as advertised but zoned exclusively for agriculture; and secondly whether one may legitimately conclude from the pre-trial correspondence that the original complaint of the plaintiff related to the lack of any prospect of the property being rezoned, from which it could be inferred that Morgan knew at the auction that the property was zoned as agricultural.
63. The difficulty in the way of accepting that Steyger made an announcement prior to the commencement of the bidding is that this evidence was tendered for the first time after the plaintiff had closed its case and

Steyger, despite being present throughout the trial, failed to testify and thus confirm that he had done so. The evidence of an announcement was first tendered by Moolman, who also had been in attendance throughout the presentation of the plaintiff's case, and hence loses much in the way of credibility and reliability on account of it emerging only after the theoretical possibility of the need for such an announcement had been raised by counsel during the examination of the plaintiff's witnesses. Neither counsel for the two defendants put it to the plaintiff's witnesses that an announcement had been made, meaning that they probably had no instructions on the matter, which considering the obvious importance of the evidence from a common sense point of view, renders the late raising of it suspect and uncreditworthy. Added to that, the plaintiff has been denied the opportunity to deal with it, either through the witnesses who testified or others that might have been called in rebuttal.

64. While the plaintiff might have applied successfully to re-open its case, one may assume it did not do so because counsel had other good grounds to support the contention that the evidence was uncreditworthy and unreliable. Firstly, the fact of a corrective announcement was never raised in the pre-trial correspondence. Indeed, in Exhibit A28, written by Steyger himself to the first defendant's attorney in response to the suggestion in Exhibit A25 that he had acted without instructions in marketing the property as commercial, Steyger indignantly placed it on record that he auctioned the property on the basis of the information supplied to him by

the first defendant. That such information included a description of the property as commercial is borne out by Lehmacher's diary entry of 17 April 2006 (Exhibit A4). Had Steyger made the announcement as alleged he would undoubtedly have said so in his letter. The fact that he did not, gives the lie to Moolman's claim, and in my assessment confirms that he proceeded with the auction on the instruction that the property was commercial and probably thought it was so.

65. Besides that, the evidence about when and where the announcement was made is contradictory. Moolman testified that Steyger made the announcement just before the bidding. In that case Steyger would have been outside the rondawel in the presence of all the bidders. Morgan's uncontradicted evidence is that at such time he stood in close proximity to Steyger and would have heard any announcement. The fact that Morgan negligently failed to take heed while the terms and conditions were read out over the loudspeakers through the public address system by Steyger sitting out of view inside the rondawel, accordingly would have no bearing upon that. Lehmacher, on the other hand, testified that she heard the announcement being made through the loud speakers. Because Steyger did not testify, it is not possible to determine accurately which of the two versions is the true account, or whether he did neither or both. By virtue of his presence in court, Steyger knew that the announcement had become controversial, that it stood in direct conflict with the advertisement, that it had not been put to the plaintiff's witnesses and that the first

defendant's witnesses had contradicted each other in relation to it. Where there is doubt of such an order about whether an obviously critical announcement has been made or not, and the witness who made the announcement is present and available to testify, the failure to call that witness permits the drawing of an appropriate adverse inference that the announcement was not made and the rejection of the contrary (and contradictory) evidence as uncreditworthy and unreliable.

66. The problem of credibility attending Lehmacher's evidence is compounded by the late discovery of Exhibit E, the note she allegedly handed to Steyger just before the bidding. Here too one might have expected Steyger to testify to corroborate the fact that the note was given to him. No reasons were advanced for the late discovery of the note, nor was any evidence tendered explaining how it was that three years after the auction, subsequent to her termination of employment, she came still to be in possession of a scrap of paper with a handwritten note on it which she handed to Steyger. Apart from the improbability of Steyger handing it back to her at the time, had Steyger kept it and produced it only at the trial this too would beg the question of why he had not discovered it in the ordinary course or why he neglected to rely upon it in his pre-trial correspondence to counter the accusation that he had acted contrary to instructions.

67. This then leaves the issue of the question allegedly asked by one of the bidders. This at least was put to Morgan. The submission by Mr Bruwer that Morgan would not have heard it, because of his negligent failure to pay heed, holds no water. The evidence discloses that Morgan would have been in close proximity to Steyger when the question was asked, if it was asked at all. The evidence also suffers the same defect of credibility attending the alleged announcement. It was not raised in prior correspondence and Steyger did not testify to corroborate it. Added to that is the contradiction about who answered the question. In the proposition put by Mr Bruwer to Morgan (which Morgan vehemently denied) it was said that Steyger answered the question. In his evidence Moolman said he answered the question.
68. Finally, there is an air of improbability to the whole scenario. The advertisement was aimed at evoking interest in a target market of buyers interested in acquiring commercial property. Flyers and posters displayed at the auction reiterated the commercial nature of the property. And, conceivably, the attending bidders, like Morgan, had intentions to use the property for purposes other than agricultural. In such circumstances, the sudden and unexpected announcement that the property was not commercial but agricultural most likely would have caused a stir and some dissatisfaction, for the simple reason that those interested would have been told that the land for sale was not that in which they were interested. By all accounts the auction went smoothly and the brouhaha one might

have expected did not occur. It also seems improbable, especially if I accept Lehmacher's evidence that she became aware of the agricultural zoning when she obtained the title deeds some time before the auction, that posters and flyers advertising the property as commercial would have been put up and distributed on the morning of the auction, without any effort made to correct their mistaken content, had the defendants been as committed as they claimed they were to rectify the false impression created by the description of the property.

69. Neither Lehmacher nor Moolman impressed as witnesses. Both were naturally and inherently biased against the plaintiff. Lehmacher was the person responsible for the advertisement and Moolman had a direct interest in the sale. Lehmacher's initial stance that the description of the property as commercial was qualified by the use of the term "hoewe", as well as her efforts to get away from the note in her diary that the property was commercial, tainted her credibility and created the impression that she might be willing to tailor her evidence to diminish any accountability for the role she played. Moolman's credibility was impacted upon negatively not only by the inconsistencies and improbabilities attached to the sudden tendering of the fact that an announcement had been made, but also by his noticeable change in demeanour as the cross-examination of him progressed and the weaknesses in his assertions became manifest. These factors too therefore militate against accepting their evidence about the supposed announcement and question.

70. The next question is whether the correspondence of the plaintiff's attorney supports a legitimate inference that Morgan knew of the agricultural zoning because he complained only that it was not possible to re-zone. The first letter Exhibit A17 addressed to the second defendant by the plaintiff's erstwhile attorney, it was submitted, stated that it had come to the notice of the client that the property could not be rezoned. That, in my opinion, is too narrow an interpretation of the gist of this letter. The complaint that the property could not be rezoned is made in the context of the plaintiff complaining that he had just become aware of the fact that the land was zoned exclusively for agriculture. The letter includes an assertion that the property had been marketed as commercial property. Prior to that statement, it is said: "Dit het intussen tot ons Kliënt se kennis gekom dat die gemelde eiendom uitsluitlik vir landbou gesoneer is..." While it is correct that the focus of the letter then shifts to the lack of any prospect of re-zoning, I doubt that such justifies, as the most probable inference, a conclusion that Morgan knew the property was zoned exclusively as agricultural, particularly in view of the assertion in the very same letter that he had only acquired knowledge of that fact after the auction. The concentration on the limited prospects of success for a re-zoning application should be construed rather as the plaintiff highlighting the evident and unalterable unsuitability of the land. Likewise, counsel's reliance on the final paragraph of Exhibit A19-20, the letter to the first defendant's attorney, affording the seller an opportunity to sort out the re-

zoning is equally misplaced. The demand is strategic and mindful of avoiding any procedural or formal defect on commencing litigation in terms of the provisions of the contract. In any event the demand is prefixed with the qualification: “*Vir wat dit werd is* maan ons u kliënt hiermee *formeel* aan....”

71. In the result therefore, I reject as improbable the evidence that Steyger, Moolman or both sought to correct the incorrect description of the property prior to the bidding and hence accept that Morgan remained under the impression that it was a commercial property and was accordingly induced to conclude the contract by that misrepresentation. As I have said, Morgan and van Vuuren’s testimony that they consciously sought out a commercial property because of the unsuitability of the property they occupied has not been contested or contradicted. It follows from this finding that there is no need to consider whether the alleged correction would have been sufficient or effective to remedy the misrepresentation.
  
72. As a general proposition in our law, it does not matter whether a misrepresentation was fraudulent, negligent or innocent should the relief sought by the innocent party be limited to *restitutio in integrum*, as in this case. Where an award of damages is sought on the basis of delictual liability then fraud or negligence will need to be established. It is sufficient for the purposes of restitution for the plaintiff to show that the misrepresentation is material, as I have already found it was. The fact that

the title deed contained the restriction for use only for agricultural purposes and the fact that Lehmacher, acting as an authorised agent for the seller, was aware of that before the auction was conducted and failed to take appropriate steps to correct the misrepresentation points towards the misrepresentation having been at least negligent. The question of whether or not there was fraud, however, may assume importance in determining the applicability of the exemption clauses.

73. Before turning to that issue, it needs to be said that there is no debate about the general effect of a misrepresentation. A fraudulent misrepresentation would normally result in the contract being void *ab initio*. However, an innocent misrepresentation renders a contract voidable, effective until set aside by the innocent party, even though it results only in a unilateral mistake on the part of the representee - *Trollip v Jordaan* 1961 (1) SA 238 (A) at 252H. This general principle has been added to recently in *Brink v Humphries and Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) at 421G where it was held that where an innocent misrepresentation results in a fundamental mistake, the “contract” is void *ab initio*. Not much turns on the distinction for present purposes. Insofar as it might have been obliged to do, so the plaintiff rescinded the voidable contract, if that, on 7 June 2006.
74. Mr Maritz, however, has argued that the first defendant was not represented by the auctioneer, the second defendant, who he submitted

was a third party to the contract for the purposes of the payment of the commission and that any innocent misrepresentation on its part did not have the effect of vitiating the obligation to pay commission. He argued that the claim for restitution can only be against the other contracting party to whom partial or complete performance has been made. For this reason, he submitted, where the representation was made by the agent of the guilty party, restitution can only be claimed from the principal. For that claim, the principal and his agent cannot be seen as joint wrongdoers or be held jointly and severally liable.

75. The submission is unsustainable for more than one reason. The submission seems first to say that the second defendant was not an authorised agent but an independent third party but then goes on to argue as a general principle that restitution cannot be claimed in respect of any performance rendered by an innocent party (payment of commission) to an agent for the benefit of the agent. Starting first with the question of whether the second defendant was indeed the first defendant's agent. In paragraph 5 of the particulars of claim the plaintiff alleged that it was. In paragraph 4.2 of its plea the first defendant admitted that the second defendant represented it in attending to the sale and procurement of an offer for the property by public auction. In paragraph 5 of its plea the second defendant did not deny, but nor did it expressly admit, that it was authorised by the first defendant. It implicitly admitted it though by pleading that Annexure A was concluded at the conclusion of the auction.

Annexure A (the offer and contract) expressly states in the preamble that the auctioneer is acting on behalf of the seller. Hence there is little doubt that the auctioneer was acting as the seller's agent. The commission payment is deducted from the purchase price and is only due and payable in terms of clause 10 of the sale agreement "met bekragtiging hiervan", that is on the conclusion of the sale. But that amount, together with the deposit, in terms of the contract, is paid upfront by the purchaser. However, the fact of its deduction from the agreed price makes it inescapably an obligation for the account of the seller. I accordingly do not accept Mr Maritz's submission that the payment of the commission involved any separate and divisible contract in terms of the second defendant's own bargain with the plaintiff. Moreover, by its nature, the remedy of rescission and restitution is aimed at setting aside the contract and returning to the *status quo ante*. An innocent party who has rendered partial performance and paid money under the contract is entitled to claim its return from the party to whom it has been paid. A void contract or a rescinded voidable contract, gives rise to no enforceable obligations. The right to commission depended on the conclusion of a valid contract. Absent any right to commission it must be restored from whence it came. The object of the remedy of *restitutio in integrum* is that the parties ought to be restored to the respective positions they were in at the time they contracted. There must be complete restitution. To allow an agent to retain unearned commission would thwart the remedy and its underlying equitable considerations.

76. This leaves the issue of the plaintiff's attempt to avoid the exemption clauses. Morgan's evidence is that he neither listened when the terms and conditions including the exemption clauses were read over the public address system, nor did he read them properly when he put his signature to Annexure A immediately after the conclusion of the auction. The exemption clauses, clause 7, 8 and 18 exempt the seller *inter alia* for latent and patent defects and provide that no guarantees are given in respect of the "kwaliteit of wettigheid van verbeterings of aktiwiteite wat daarop bedryf word". The property is explicitly sold subject to the conditions of the title deed. In clause 8 the purchaser acknowledges that he was not induced or influenced by any express or tacit representations to conclude the contract. And clause 18 provides that the document constitutes the entire contract between the parties and no representations (voorleggings) made by either party will be binding unless in writing, annexed to the agreement and signed by both parties.
77. Counsel for the plaintiff placed much reliance on *Du Toit v Atkinsons Motors Bpk* 1985 (2) SA 893 (A) in support of his contention that the plaintiff can avoid the exemption clauses on the grounds of *iustus error*. The facts of that case bear superficial resemblance to the present case, but I am not persuaded that the principle enunciated has equal application. There the appellant, enticed by an advertisement in a newspaper offering a "Mercedes Benz 350 1979", agreed orally to purchase the vehicle. After the vehicle was registered in his name he

signed without reading a document including an exemption clause excluding the liability of the seller in connection with any representation in respect of *inter alia* the year of manufacture of the vehicle. The vehicle was in fact a 1976 model. The trial court found the appellant was bound by the provisions of the contract. Its decision was reversed on appeal on the ground that the seller's failure to explain the ambit of the clause signed after the contract had been concluded amounted to a further misrepresentation by silence. However, what was critical to the decision, in my view, was the fact that the exemption clause was signed after an oral contract not incorporating any exemption had been concluded and that the seller had not explained the ambit of the exemption to the purchaser who did not read the document. In other words there was a misrepresentation not only about the attributes of the *merx* but also about the contents of the document signed.

78. There is no evidence before me that the content of Annexure A was misrepresented in any way to Morgan. The terms and conditions of the sale were announced prior to the bidding and Morgan was given the contract to read before he signed it. This accordingly is not an instance where we are concerned with a misrepresentation about the ambit of the terms contained in a written contract. If Morgan was mistaken as to the written terms of Annexure A that was due entirely to his own unreasonable conduct in paying insufficient heed and his error in that regard cannot be

categorised as *iustus* - *Standard Credit Corp Ltd v Naicker* 1987 (2) SA 49 (N).

79. However, the matter does not end there. The reasonableness or otherwise of Morgan's conduct should not be adjudged solely at the time he signed the offer. One cannot divorce his conduct from his mistaken assumption that he was purchasing a commercial property and that such mistake had been induced by the wrong information in the advertisement, the posters, the flyers and possibly the failure of Steyger to draw attention to his mistaken assumption when he discussed with him the plaintiff's purpose in wanting to acquire the property. The advertisement was aimed at creating the impression that the land was possessed of the attribute of commercial zoning and on the strength of that mistaken impression, negligently conveyed, the plaintiff purchased the property. The mistake was unlikely to be rectified by a proper perusal of the document - Annexure A. Such, while not quite an *error in corpore*, was a mistake about an essential attribute of the *merx* which induced the plaintiff to purchase something fundamentally different to what he intended.
  
80. Traditionally our law has not been willing to enforce exemption clauses excluding liability for misrepresentations where the contract has been induced by a fraudulent misrepresentation. The principle was enunciated in *Wells v SA Alumenite Co* 1927 AD 69 at 72 as follows:

“On grounds of public policy the law will not recognize an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other. The Courts will not lend themselves to the enforcement of such a stipulation; for to do so would be to protect and encourage fraud.”

81. Left at that an exemption clauses would be binding absent any fraud and the plaintiff could not escape the contract notwithstanding the misrepresentation.
  
82. The submissions by counsel on the possible fraudulent nature of the misrepresentation were somewhat muted. As I have indicated, having regard to Exhibit A28, I accept that Steyger probably *bona fide* believed the property was commercial. Because Carel Moolman did not testify, it is difficult to infer as the most plausible inference that his instruction to Lehmacher (reflected in her diary as “landbou/kommersiële) was made knowing it was wrong and with the intent to mislead. When Lehmacher caused the misrepresentation to be published she genuinely believed it was true. Her failure to correct it when the truth came to her knowledge, as I have said, at the very least was negligent, if not reckless. The reckless failure to correct an untrue misrepresentation does amount to fraudulent misrepresentation - *Ruto Flour Mills (Pty) Ltd v Adelson* 1959 (4) SA 120 (P) at 122G. However, I do not think the evidence establishes beyond a balance of probabilities that Lehmacher was reckless. There is insufficient cogent evidence from which one may infer a state of mind on

her part that she foresaw the possibility of a bidder being misled to conclude a contract on the basis of the misrepresentation and then recklessly reconciled herself to that possibility. Busy with other aspects of the auction, and perhaps lulled into comfort by the availability of the title deed, her conduct was most likely only negligent, in the sense that a reasonable person in her position and in the circumstances would have foreseen the possible effects of the misrepresentation and would have taken appropriate steps to safeguard against them. From what has gone before, it is evident that Lehmacher, despite her knowledge of the true situation, did nothing or insufficient to convey the correct impression.

83. Since *Trollip v Jordaan* 1961 (1) SA 238 (A) our law appears to have taken a different turn by allowing perhaps less than fraud to avoid an exemption clause. Although in that case the majority of the court upheld an exemption clause, both the majority and the minority of the court were in agreement that, if the buyer's mistake could be described as an *error in corpore*, then the sale, including the exemption clauses, would be void in its entirety. As Christie *The Law of Contract in South Africa* (5<sup>th</sup> edition) at 320 puts it:

“a mistake may sometimes be fundamental in the sense that because of its existence agreement is so completely lacking that it is impossible to say there is any contract at all.”

In *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D) Howard J refused to give effect to an exemption clause where the misrepresentation had resulted in an *error in corpore* which vitiated consent to the whole agreement. The learned judge cited with approval the following statement made by Hunt in 1961 *Annual Survey of South African Law* at 95:

“*Prima facie* it would seem that the vice taints consent to the whole contract, including the exemption clause. All the terms of the contract together regulate the contract's object, and it is difficult to see how the consent can but stand or fall as a whole. It seems impermissible to find a separate untainted consent to the exemption clause.”

Howard J in accepting the proposition added (at 171B):

“I can find no fault with the reasoning, provided that the “vice” is understood as meaning something in the nature of an essential error which vitiates consent and renders the contract void *ab initio*.”

In *Brink v Humphries and Jewell (Pty) Ltd (supra)* the Supreme Court of Appeal approved of this decision stating (at 42G) that where a misrepresentation results in a fundamental mistake the contract is void *ab initio*. It might be said then that the emphasis has shifted from the nature of the fault element attending the misrepresentation to the nature and quality of the consensus vitiating error caused by the misrepresentation.

84. In the present case, the fundamental and essential object of the contract was the purchase and sale of the property for use as a commercial property. The situation here is akin to that in *Milne N.O. v Harilal* 1961 (1) SA 799 (N). In that case the defendant rescinded a contract of sale of land which had been sold to him at an auction and which had been advertised as “an excellent sugar farm”. It appeared from the evidence that the farm could not be truthfully described as such. About half of the farm was so steep and rocky that it was unsuitable for the growth of sugar cane. The court found the advertisement to be a fraudulent misrepresentation, and gave judgment for the defendant. A similar result would have been permissible under the new approach had the court found a material negligent misrepresentation which had induced a fundamental or essential mistake, that is a mistake about the core attribute of the *merx*. As in the present case, the land was unsuitable for the purpose represented. Consequently, the entire consensus was tainted. The mistake induced by the misrepresentation in the present matter likewise goes to the essence of the contract with the result that consensus was fundamentally lacking and hence there could not have been an untainted consent to the exemption clauses. Once the consent to the exemption clauses is found to be tainted there is less force in the argument that the error could have been reasonably avoided by Morgan reading the title deeds. The exemption clauses were consented to on the mistaken premise negligently misrepresented that the title deeds contained no restriction on commercial use. In any event, the evidence establishes that

Morgan was not informed that the title deeds were available for inspection. It was reasonable therefore for Morgan to assume mistakenly (*iustus*) that the title deeds of a property represented as commercial would contain no restriction on commercial use.

85. Accordingly, there is no basis for excluding liability for the misrepresentation and the plaintiff should be granted restitution. Each defendant should be ordered to return that which it received. Costs should be awarded jointly and severally.
86. The following orders are issued:
  1. The first defendant is ordered to pay the plaintiff the amount of R200 000.
  2. The second defendant is ordered to pay the plaintiff R182 400.
  3. The defendants shall pay interest on the aforementioned amounts at the rate of 15,5% per annum from 18 May 2006 to the date of payment thereof.
  4. The defendants are ordered to pay the costs of suit, jointly and severally, the one paying the other to be absolved.

**JR MURPHY**  
**JUDGE OF THE HIGH COURT**

Date Heard: 4, 5 & 23 March 2009  
For the Applicant: Adv N Davis SC, Pretoria  
Instructed By: Snyman's Attorneys, Pretoria  
For the 1<sup>st</sup> Respondent: Adv P Bruwer, Johannesburg  
Instructed By: Ben Steyn Inc. c/o MP Koekemoer Attorneys, Pretoria  
For the 2<sup>nd</sup> Respondent: Adv JD Maritz, Pretoria  
Instructed By: Jaco Roos Attorneys, Pretoria