CASE NO.: I 103/05

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JOSEPH FRANS KUIIRI

PLAINTIFF

and

BULK TRADE (PTY) LTD FIRST

DEFENDANT

AARON MUSHIMBA **SECOND**

DEFENDANT

ERIS FARMING (PTY) LTD **THIRD**

DEFENDANT

OBETH MBUPAHA KANDJOZE **FOURTH**

DEFENDANT

KAHOO FRIEDA WITNESS KANDJOZE FIFTH

DEFENDANT

KANAINDO HOLDINGS (PTY) LTD SIXTH
DEFENDANT
AGRICULTURAL BANK OF NAMIBIA SEVENTH
DEFENDANT
THE REGISTRAR OF DEEDS EIGHTH
DEFENDANT

CORAM : PARKER, A J

Heard on **:** 13 March 2006

Delivered on 31 March 2006

JUDGMENT

PARKER, A J:

BACKGROUND

[1] The plaintiff instituted an action against first to seventh defendants in which, in the main, he avers that he was induced by fraudulent misrepresentation by the second defendant into signing an agreement of sale with the first defendant, represented by the second defendant, for the sale of farm Sandfontein (now called Remaining Extent of Farm Santfontein), No. 468 (the farm), Gobabis District, of which the plaintiff was at all material times the owner, to the first defendant, of which, according to the declaration, the second defendant was at all material times the sole shareholder and managing director (Annexure "JK4" to the plaintiff's particulars of claim).

[2] The pleading sets out further that the second defendant is also the sole shareholder and managing director of the third defendant; fourth and fifth defendants are married in community of property; sixth defendant is a company limited by liability, of which the plaintiff is a shareholder; seventh defendant is a juristic person; and eighth defendant is the Registrar of Deeds. The pleading also states that the third, sixth, seventh and eighth defendants have been cited because they might have an interest in the outcome of the present dispute, and no substantive relief is, therefore, claimed against them.

The plaintiff's particulars of claim

[3] The plaintiff's main claim, entitled "VOIDABLE SALE OF THE FARM", is couched in the following terms:

> 21. The parties to the joint venture agreement were not able to continue with it and

PLAINTIFF and **SECOND DEFENDANT** agreed orally during about April/May 2001 at Windhoek that:

21.1 **PLAINTIFF** would sell the farm to **FIRST DEFENDANT** at a purchase price of N$ 540,000.00 that does not reflect the true value of the farm because in reality only 50% of the ownership is acquired.

21.2 The said sale was conditional upon **PLAINTIFF** acquiring 50% of the shareholding in the **FIRST DEFENDANT** and that **PLAINTIFF** would remain in possession and control of the farm; and

21.3 This oral agreement supersedes **JK1** as amended.

22. **PLAINTIFF** never intended to relinquish his entire ownership of the farm, nor that the farm be sold to third parties.

23. **SECOND DEFENDANT** fraudulently represented to **PLAINTIFF** at the time that:

23.1 He would comply with the terms of the agreement referred to in paragraph 21.1 supra, while he had no intention of doing so; and

23.2 The “purchase price” of N$540,000.00 represents consideration for 50% of the farm while his intention was to acquire the entire ownership of the farm for that price.

24. **PLAINTIFF** was induced by these misrepresentations to sign an agreement of sale with **FIRST DEFENDANT** on 31 May 2001, selling the farm for N$540,000.00. A

copy is annexed, marked "**JK4**".

25. As a result the said agreement is voidable and should be declared void on the basis of fraud.

26. The farm was registered in the name of **FIRST DEFENDANT** on 14 December 2001 in terms of deed of transfer T7666/2001. A copy is annexed, marked "**JK5**". This deed should equally be declared void, alternatively be set aside.

27. **PLAINTIFF** tenders to repay the N$540,000.00 or any amount the court may find he received as a result of this voidable transfer.

FURTHER SALE OF FARM:

28. On 8 July 2003 **FIRST DEFENDANT**, represented by **SECOND DEFENDANT** entered into a deed of sale with **FOURTH** and **FIFTH DEFENDANT** in respect of the farm. A copy is annexed, marked "**JK6**".

29. On 9 September 2003 **PLAINTIFF** caused a summons in respect of the disputed ownership of the farm to be served on, amongst others, **FIRST, SECOND** and **FOURTH DEFENDANTS.**

30. Despite knowledge of the disputed ownership the said defendants entered into the said deed of sale and proceeded with the transfer of ownership of the farm into the names of **FOURTH** and **FIFTH DEFENDANTS** on 9 December 2003. A copy of the deed of transfer number T6728/2003 is annexed, marked "**JK7**"

31. **FIRST DEFENDANT** could not transfer ownership in the farm to **FOURTH** and **FIFTH DEFENDANTS** alternatively transferred it subject to **PLAINTIFF'S** rights.

32. Furthermore, the sale and transfer were effected by **SECOND DEFENDANT** in collusion with **FOURTH** and **FIFTH DEFENDANTS** with the fraudulent intent to frustrate **PLAINTIFF'S** claim to the ownership of the farm.

33. As a consequence this transfer should also be set aside.

[4] The plaintiff's first alternative claim, entitled "50% SHAREHOLDING IN FIRST DEFENDANT", contains eight paragraphs:

34. In the event the court finds that the sale of the farm by **PLAINTIFF** to **FIRST DEFENDANT** is not voidable: **PLAINTIFF** repeats paragraph 21, *supra* and alleges that he complied with his obligations under the agreement.

35. As a result **PLAINTIFF** was since 31 May 2001, when he signed the deed of sale (**JK4**), owner of 50% of the shareholding in **FIRST DEFENDANT**, alternatively, deemed to be such owner.

36. In the premises **SECOND DEFENDANT** or directors appointed by him only represented 50% of the voting power, or decision-making, of **FIRST DEFENDANT**.

37. **FIRST DEFENDANT** had to decide by 75%, alternatively 51%, of its voting to (*sic*) power to sell the farm.

38. **PLAINTIFF**, or a director appointed by him, would never have agreed to **FIRST**

DEFENDANT selling the farm and as a result no valid decision to sell the farm could have been taken by it.

39. Consequently, **FIRST DEFENDANT** could not enter into the deed of sale (**JK6**) with **FOURTH** and **FIFTH DEFENDANTS** and as a result the said deed is void, alternatively voidable.

40. **FOURTH** and **FIFTH DEFENDANTS** knew at all material times that **PLAINTIFF** is entitled to 50% ownership in **FIRST DEFENDANT**, alternatively 50% of the farm, and fraudulently colluded with **SECOND DEFENDANT** to deprive **PLAINTIFF** of his ownership of the farm.

41. In the premises the deed of sale (**JK6**) and the transfer (**JK7**) in respect of the farm by **FIRST DEFENDANT** to **FOURTH** and **FIFTH DEFENDANTS** should be set aside.

[5] The plaintiff's second alternative claim, entitled "REMAINDER OF PRICE/VALUE OF FARM", is framed thus:

42. In the event the court finds that the respective deeds of sale and transfers are not void or voidable, **PLAINTIFF** alleges that:

42.1 The joint venture agreement **(JK1)**, as amended by the two addenda **(JK2** and **JK3)** is the operative agreement; and

42.2 He never received the agreed price, alternatively, the true value of the farm.

43. In terms of clause 4.5 of **JK1**, as amended by clause 2.3(c) of **JK3**, the parties agreed that the consideration for the farm would be the valuation minus the amounts referred to in clause 1 of **JK1**. The amount in the said clause 1 is N$155,000.00.

44. In addition to the said amount a further N$98,110.00 (clause 3.2 of **JK2**) and N$30,000.00 (clause 3.2 of **JK3**), totalling N$128,110.00 were advanced to the benefit of **PLAINTIFF**.

45. The farm was valued at N$1,747,200.00 and as a result of the agreed purchase price of the farm was N$1,464,090.00 [N$1,747,200.00 – (N$155,000.00 + N$1,128,110.00)].

46. The purchase price of N$540,000.00 in **JK4** and **JK5** and paid by **FIRST DEFENDANT** is not a true reflection of the agreed price for the farm, or its value, and **PLAINTIFF** never intended to sell the farm for that price.

47. The purchase price as reflected in **JK4** and **JK5** is a mistake due to **SECOND DEFENDANT'S** fraud, alternatively, a misunderstanding of the reason for the sale of the farm and does not reflect the agreement between the parties contained in **JK1** as amended.

48. As a result, clause 4.1 of **JK4** should be rectified to replace the amount of N$540,000.00 with the amount of N$1,464,090.00.

49. **PLAINTIFF** received the amount of N$540,000.00 (which includes the loan amounts referred to in **JK1** as amended).

50. As a result, **FIRST** and **SECOND DEFENDANTS** are indebted, jointly and severally, to **PLAINTIFF** in the amount of N$1,207,200.00, arrived at as followings (*sic*): N$1,747,200.00 – N$540,000.00. This amount has been due and payable since 15 December 2001.

[6] The Plaintiff's prayers are set out as follows:

A. MAIN CLAIM

1. An order declaring the deed of sale of 31 May 2001 between **PLAINTIFF** and **FIRST DEFENDANT** in respect of the sale of the Remaining Extent of Farm Sandfontein No. 468 void ab initio.

2. An order setting aside the transfer of the ownership of the Remaining Extent of Farm Sandfontein No. 468 on 14 December 2001 into the name of **FIRST DEFENDANT** by virtue of deed of transfer number T7666/2001.

3. An order declaring the deed of sale of 8 July 2003 between **FIRST DEFENDANT** and **FOURTH** and **FIFTH DEFENDANTS** in respect of the sale of the Remaining Extent of the Farm Sandfontein No. 468 void ab initio.

4. An order setting aside the transfer of the ownership of the Remaining Extent of the Farm Sandfontein No. 468 on 9 December 2003 into the names of **FOURTH** and **FIFTH DEFENDANTS** by virtue of deed of transfer number T6728/2003.

5. An order that **EIGHTH DEFENDANT** gives effect to paragraphs 2 and 4 of this order and register the Remaining of Extent of the Farm Sandfontein No. 468 in the name of **PLAINTIFF.**

6. An order that **PLAINTIFF** pays to **FIRST** alternative, **SECOND DEFENDANTS**, the amount of N$540,000.00 subsequent to the registration of the Remaining Extent of the Farm Sandfontein No. 468 in his name.

7. An order that **FIRST, SECOND, FOURTH** and **FIFTH DEFENDANTS** pay **PLAINTIFF'S** costs on an attorney and client scale.

B. FIRST ALTERNATIVE CLAIM

1. An order declaring that **PLAINTIFF** is the owner of 50% of the shareholding in **FIRST DEFENDANT** with effect from 31 May 2001.

2. An order that **SECOND DEFENDANT** sign all the required documents to reflect **PLAINTIFF'S** ownership of **FIRST DEFENDANT'S** shareholding in the company registers and failing which, authorising the Registrar of this court to do so.

3. An order declaring the deed of sale of 8 July 2003 between **FIRST DEFENDANT** and **FOURTH** and **FIFTH DEFENDANTS** in respect of the sale of the Remaining Extent of the Farm Sandfontein No. 468 void ab initio.

4. An order setting aside the transfer of the ownership of the Remaining Extent of the Farm Sandfontein No. 468 on 9 December 2003 into the names of **FOURTH** and **FIFTH DEFENDANTS** by virtue of deed of transfer number T6728/2003.

5. An order that **EIGHTH DEFENDANT** gives effect to paragraph 4 of this order by registering the Remainder of the Farm Sandfontein No. 468 in the name of **FIRST**

DEFENDANT.

6. An order that **FIRST, SECOND, FOURTH** and **FIFTH DEFENDANTS** pay **PLAINTIFF'S** costs on an attorney and client scale.

C. SECOND ALTERNATIVE CLAIM

1 An order rectifying the deed of sale of 31 May 2001 between **PLAINTIFF** and **FIRST DEFENDANT** by replacing the amount of N$540,000.00 in sub-paragraph 4.1 thereof with N$1,646,090.00 and deleting sub-paragraphs 4.3 and 4.4.

2. An order that **FIRST** and **SECOND DEFENDANTS** jointly and severally pay to **PLAINTIFF** the amount of N$1,207,200.00 plus interest at the rate of 20% per year calculated from 14 December 2001, alternatively a *tempore morae*.

3. An order that **FIRST** and **SECOND DEFENDANTS** pay **PLAINTIFF'S** costs on an attorney and client scale.

Overall basis of first and second defendant's exception

[7] The first and second defendants excepted to the plaintiff's particulars of claim. The relevant part of the *chapeau* of the exception filed by them reads: "…. the first and second defendants hereby except to the plaintiff's particulars of claim as it does not disclose a cause of action for the relief claimed and/or it lacks the necessary allegations to sustain the relief claimed." I observe here that inasmuch as the said defendants have placed the clause "it does not disclose a cause of action for the relief claimed" conjunctively and disjunctively, instead of disjunctively only, with the clause

"it lacks the necessary allegations to sustain the relief claimed", the former clause is pleonastic as far as the statutory provision is concerned: the Rule prescribes one requirement or test as far as the first and second defendants' exception goes in the present application, namely, "where (a pleading) lacks averments which are necessary to sustain an action". I am going to decide the exception with this observation in view.

[8] The exception that they filed covers about eight pages, and so I will not set them out here. I will refer to them as I go on. In the present application, the first and second defendants are the applicants (i.e. excipients) and the plaintiff the respondent. For the sake of clarity, I will in this judgment continue to refer to the plaintiff as the plaintiff, and the first and second defendants as the first and second defendants.

[9] Both counsel submitted helpful heads of arguments in respect of which I am indebted to them for their industry. Indeed, in their oral submissions, both of them merely highlighted certain points already covered in their heads of arguments and spoke to some of the paragraphs. Therefore, if in the course of this judgment I use the words "submit" and "argue" and their derivatives, they must be understood to encompass both the heads of arguments and the oral submissions made in court.

[10] The crisp question to determine is essentially this: is the defendants' contention that "the plaintiff's pleading objected to, taken as it stands, is legally invalid for its purpose" well founded?[1]

General principles of law on exception

[11] It is a cardinal principle in dealing with exception that if evidence can be led, which discloses a cause of action alleged in the pleading, that particular pleading is not excipiable. Thus, a pleading is excipiable on the basis that no possible evidence led on

[1] See *Salzmann v Holmes* 1914 AD 152 at 156.

the pleading can disclose a cause of action.[2] Besides, as Mr. Coleman, counsel for the plaintiff, submitted, an exception is restricted to pure matters of law and facts alleged are taken to be admitted.[3] In other words, "[F]or the purposes of the exception the facts pleaded must be accepted as correct." [4] That is so, unless the facts pleaded are plainly false and so clearly baseless that it cannot possibly be proved.[5] In addition, the authorities have emphasized that the remedy of an exception is available when the objection goes to the root of the other party's claim or defence.[6] That is the manner in which I approach the present case.

First and second defendants' first exception

[12] The first exception concerns the paragraphs under the "main claim" in the plaintiff's particulars of claim, which I have set out in para. 2, above; therefore, I will not set them out here again. I now examine the first exception.

[13] Misrepresentation is a false statement of fact made by one party to another before a contract is concluded: if a party made the false statement with knowledge of its untruthfulness then it was fraudulent. Put simply, misrepresentation consists of making a wilfully false representation to another with the intention that he should rely and act thereon and with the result that in so acting, he suffers harm.[7] And [G]enerally speaking fraud is proved when it is shown that a false representation has been made, (i) knowingly or, (ii) without belief in its truth or, (iii) recklessly careless whether it be

[2] See *McKelvey v Cowan NO* 1980 (4) SA 525 at 526 C-E.
[3] See Isaacs, *Becks Theory and Principles of Pleading*, 1982 : par. 62.
[4] *Marney v Watson and Another* 1928 (4) SA 140 at 144 F-G.
[5] Van Winsen, *et al*., *The Civil Practice of the Supreme Court of South Africa (Now the High Courts and Supreme Court of South Africa)*, 1997: p 493, and the case there cited.
[6] *Ibid*. p 489.
[7] *Dictionary of Legal Words*, October 2003, Vol. 3.

true or false."[8] In his authoritative writing, Christie stated: "A party who has been induced to enter into contract by the misrepresentation of an existing fact is entitled to rescind the contract provided the misrepresentation was material, was intended to induce him to enter into the contract and did so induce him."[9] And it has been held that a party "who has been induced to contract by the material and fraudulent misrepresentations of the other party may either stand by the contract or claim a rescission."[10]

[14] Whether or not the plaintiff can prove all the relevant allegations in the "main claim" so as to succeed is not a matter for me to decide now. Indeed, for the purpose of deciding the exception, I must examine those paragraphs to see if they disclose a cause of action on the assumption that the alleged facts contained therein are admitted as correct or that he could prove them. The first most important facts are contained in paragraphs 21, 22 and 23 of the plaintiff's particulars of claim. From paragraphs 21, 22 and 23, the plaintiff alleges that he was induced by the second defendant's fraudulent misrepresentation to sign the "AGREEMENT OF PURCHASE AND SALE OF IMMOVABLE PROPERTY" (Annexure "JK4" to the plaintiff's particulars of claim) with the first defendant, and he has alleged in paragraph 3 of his particulars of claim the relationship between the first defendant and the second defendant. The plaintiff has, therefore, prayed for a rescission of the contract of sale because the contract is voidable, and should, therefore, be declared void on the basis of the second

[8] *Ruto Flour Mills (Pty) Ltd v Adelson* 1959 (4) SA 120 at 122.

[9] Christie, *The Law of Contract of South Africa*, 3rd ed. : p 301, and the cases there cited.

[10] *Bowditch v Peel and Magill* 1921 AD 561 at 572.

defendant's fraudulent misrepresentation, which I must assume he can prove. The relevance of paragraphs 21, 22 and 23 of the plaintiff's particulars of claim are the light that they throw on the attitude of the plaintiff when he entered into the "Agreement of Purchase and Sale of Immovable Property", which in turn are relevant to establishing whether or not there was fraudulent misrepresentation that caused the plaintiff to enter into the agreement of sale.

[15] I now turn to the other important parts of the pleading under the "main claim". Based on the facts alleged therein, the plaintiff claims that the named defendants had a fraudulent intent to frustrate the plaintiff's claim to the ownership of the farm, particularly because the first defendant, represented by the second defendant, the second defendant and at least the fourth defendant knew that there was a dispute over the ownership of the farm and the dispute was the subject matter of a judicial process. Despite having this knowledge, the first defendant, represented by the second defendant, nevertheless went ahead to effect the transfer of the farm to the fourth and fifth defendants, who are married in community of property. Thus, the case of the plaintiff is that, as Mr. Coleman submitted, these defendants are not innocent parties.

[16] The plaintiff bears the burden of proving what he has alleged in the relevant paragraphs of his particulars of claim under discussion. If the plaintiff can prove those facts alleged, keeping in view the legal principles concerning fraudulent misrepresentation discussed above, I cannot see how it can be contended that the paragraphs under the "main claim" do not disclose a cause of action, if it is accepted that a "cause of action" is "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."[11] In this connection, I agree with Mr. Heathcole, counsel for the defendants, that what the plaintiff alleges and has to prove must be

[11] See *McKenzie v Farmers' Cooperative Meat Industries Ltd* 1992 AD 16 at 22.

clear and precise. But, with respect, I fail to see the application to the present case of the principle in the case referred to me by counsel for the first and second defendants, namely, *Standard Bank of South Africa Ltd v Coetsee*.[12] The full quotation reads: "As Millin, J observed in *Rapp and Maister v Aronovsky* 1943 WLD 68 at 75, generally, before a term can be implied, it must be capable of clear and exact formulation".'[13] A line above the quoted sentence shows irrefragably that the Court in *Coetsee* was dealing with the issue of "unexpressed but implied or tacit term", which is totally different from the issue that is engaging my attention *in casu*. Be that as it may, I am satisfied that the plaintiff's "main claim" is formulated clearly and precisely.

[17] Counsel for the first and second defendants argued that the plaintiff could not place reliance on paragraph 21.2 of the plaintiff's particulars of claim because what is contained in there is not a term of an agreement but a condition. As I understand it, the gravamen of counsel's argument is briefly as follows: A term and a condition are two different concepts, and a condition cannot be enforced. And, if one placed this proposition of the law against what, according to him, Mr. Coleman said, namely that the condition in paragraph 21.2 was not complied with, then on the plaintiff's own version there was no contract; then measured against that, the fraud alleged by the plaintiff is not possible. He also took issue with Mr. Coleman's statement that the terms of the agreement of sale is irrelevant.

[18] In support of his proposition of the law, Mr. Heathcote referred me to *Administrateur-General vir Die Gebried Suidwes-Afrika v Hotel Onduri (Edms) Bpk en Andere*,[14] particularly the passage, which is in English (the judgment is in Afrikaans).[15] I have advisedly visited the case, judgment in which contains the passage referred to me by Mr. Heathcote. The passage is from *Ogus v Secretary for Inland*

[12] 1981 (1) SA 1131.
[13] At 1135 D-G.
[14] 1983 (4) SA 794.
[15] At 799.

Revenue:

> "Stipulations or provisions in a contract dealing with terms of performance, are often loosely referred to as conditions, but they are not conditions in the narrow legal sense of the word, but merely terms of the contract. A condition affects the existence of an obligation and a term the nature of an obligation. A condition determines whether there is a contract or not and therefore whether there is liability or not, while a term does not relate to the existence of the contract or obligation but simply regulates or modifies the obligations of the parties to the concluded contract. A condition is either fulfilled or not, according to whether a prescribed event does or does not take place. If the condition is fulfilled, it has an automatic effect, either creating or cancelling a contractual obligation. The fulfilment of a condition cannot be enforced. A term, on the other hand, imposes an obligation upon the party or parties concerned to make certain performances. If such party does not make the performance as prescribed by the term, the other party has an action for enforcement of the obligation, or for damages for breach of the term. See *Macduff & Co Ltd (In Liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 588-590.[16]

As I see it, what is referred to as a condition in the alleged oral agreement between the plaintiff and the second defendant (paragraph 21.2 of the plaintiff's particulars of claim) is in their context only the circumstances in which the plaintiff agreed to sell

[16] 1978 (3) SA 67 at 72-73.

the farm to the first defendant at a purchase price of N$540,000.00, which according to the parties' understanding did not represent the real value of the farm because only 50% of the ownership of the farm was to be assigned. It is not a condition "in the narrow legal sense of the word" but rather a term of the alleged oral agreement. Besides, I understood Mr. Coleman's argument to be this: If the agreement of sale (Annexure "JK4" to the plaintiff's particulars of claim) is declared void "on the basis of fraud," as prayed for by the plaintiff, then, paragraph 11.2 of Annexure "JK4" of the agreement (the first and second defendants consider this paragraph to be their *coup de graĉe* in their legal objection to the plaintiff's claim) will be irrelevant. I agree with Mr. Coleman. That is the fate of any provision of an agreement that is declared void. In the result, the allegation of fact by the plaintiff of the second defendant's fraudulent misrepresentation cannot be excepted on that score.

[19] Mr. Heathcote submitted that faced with the contents of paragraph 11.2 (of Annexure "JK4"), the plaintiff can only avoid Annexure "JK4" by alleging a fraudulent misrepresentation clearly and sufficiently. He relied on *Wells v South Africa Alumenite Co*[17]. I respectfully do not see how the application of the general principle in *Wells* to clause 11.2 of Annexure "JK4" assists the case of the defendants. That general principle admits of a qualification. In this connection, Innes, CJ observed that "any representation" "clearly … would not cover representations not only incorrect but fraudulent."[18] *In casu*, the plaintiff's cause of action is based on the allegation of fraudulent misrepresentation made to him by the second defendant, which induced

[17] 1927 AD 69.
[18] At 72.

him to enter into the agreement of sale (Annexure "JK4"): as I see it, it is not based on an allegation that the plaintiff was misled as to the nature of the document. And I do find that the plaintiff does not merely characterize the actions of the second defendant as fraudulent misrepresentation; neither does he make a bald statement that second respondent is liable for fraudulent misrepresentation. The facts the plaintiff puts forward are not bare allegations. He sets out facts upon which the allegations are made. From what I have said here, in my judgment, it cannot be said that the pleadings read as a whole – and that is what I must do[19] – the plaintiff's "main claim" "is composed entirely of conjectural and speculative hypotheses, lacking any real foundation in the pleadings or in the obvious facts."[20] We must not lose sight of the fact that, as I said previously, whether or not the plaintiff can prove all those allegations is not a matter for me to decide now, as I decide on the exception, which is my present engagement.

[20] I now turn to another important submission by counsel for the first and second defendants in this regard, namely, that the expression of an intention to do something *in futuro* cannot be construed as a fraudulent misrepresentation of fact. Indeed it is commonly said that mere promises or intention to do something in future are not statements of fact, but this is apt to be misleading because that which is in the form of a promise may be in another aspect a representation.[21] A promise is really a statement of fact, because it is a statement of a present intention as to the future. If X makes a

[19] See *Telimatrix (Pty) Ltd v Advertising Standards Authority SA* [2006] 1 All SA 6 (SCA) 6 at 9.
[20] *Loc. cit.*
[21] See *Clydisdale Bank v Paton* [1896] AC 381 at 394 quoted in Dias, *Clerk & Lindsell on Torts, 16th ed.* 1989 : par. 18-06.

promise to Y, believing that he or she will fulfil it, the reason why Y cannot hold X liable for fraud, if X does not fulfil it, is not because X's promise is not a statement of fact. It is simply because X believed the statement of his or her intention to be true when he or she made it, but if X had no such belief or intention X is liable for fraud if he or she does not fulfil it. Indeed one's intention is always a fact, whether it relates to the present or to the future: it is one's own state of mind. The quotation by Christie, which counsel for the plaintiff referred me to buttresses the view I have proffered above. Christie writes:

> In *Ruto Flour Mills (Pty) Ltd v Adelson* 1959 4 SA 120 (T) 122-3 Boshoff J correctly observed that to make an incorrect statement about one's own state of mind can only be a fraudulent misrepresentation. Such a statement can never be honestly made, but a statement about somebody else's state of mind may well not be fraudulent. One aspect of a person's state of mind is his intention concerning the future, and a party who is alleged to have induced another to contract by promising to do something in the future may find himself in a difficult position. If he denies making the promise he will naturally deny the intention to fulfil it, so if the court finds he did make the promise it must have been made fraudulently, since he has proved his own state of mind at the time.[22]

Indeed, the plaintiff alleges in his particulars of claim that second defendant promised or expressed his intention that he would fulfil the terms of their oral agreement while he had no intention of doing so. Thus, the plaintiff alleges that the second defendant made an incorrect statement about his own state of mind, and that "can only be

[22] Christie: p 306. (The quotation appears also in the 4th edition of the book.)

fraudulent misrepresentation." The submission by Mr. Heathcote about an expression to do something *in futuro* not capable of being construed into a fraudulent misrepresentation is, therefore, not well founded.

[21] From what I have said above, I am satisfied that the plaintiff, in the relevant parts of the declaration, alleges facts to sustain a cause of action based on fraudulent misrepresentation. He alleges facts, which he must prove that (a) the misrepresentation was made by the second defendant; (b) the representation was false, i.e. knowingly and without belief in its truth; (c) the misrepresentation was intended to induce the plaintiff into entering into the agreement of sale; and (d) the misrepresentation did induce the plaintiff to enter into the agreement of sale; and; he has suffered damage as a result.[23]

[22] I stated previously that I am satisfied that the plaintiff's allegation of fact is not based on being misled by the second defendant as to the nature or contents of the agreement of sale (Annexure "JK4"): he bases his cause of action in the "main claim" on fraudulent misrepresentation by the second defendant. And the first defendant being a legal person, it could not make any misrepresentation: the second defendant

[23] According to Viljoen, JA in *Standard Bank of South Africa v Coetsee* 1981 (1) SA 1131 at 1145 C-F, the essential requirements, which a plaintiff in an action for fraudulent misrepresentation must prove are:

> "(a) a representation,
> (b) which is, to the knowledge of the representer, false,
> (c) which the representer intended the representeee to act upon,
> (d) which induced the representee so to act, and
>
> that the representee suffered damage as a result."

made it on its behalf. As Mr. Coleman, in his submission, asked rhetorically, how does a company make a misrepresentation? The plaintiff has alleged facts that the second defendant is the sole shareholder and managing director of the first defendant and, therefore he - and he alone - controls the first defendant, and the second defendant used the first defendant's corporate entity fraudulently and the plaintiff has suffered damage as a result. Indeed, courts have felt themselves free to disregard the corporate entity where there is fraud or improper conduct.[24] If the plaintiff can prove every fact alleged in paragraphs 51, 52 and 53 in his particulars of claim, I cannot see how it can be argued that those paragraphs do not disclose a cause of action.

[23] Another point on which the first exception is premised is briefly this: the cause of action (i.e. under the "main claim") cannot be sustained because a bond has now been registered in favour of an innocent party. In this connection, the submission by counsel goes like this: the Court can only order rescission if it resulted in the parties being put in the position in which they were, as if no contracts have been concluded. In support of his contention, counsel referred me to authorities. Counsel for the plaintiff argues contrariwise. In brief, his submission is thus: the fact that a property in respect of which a party claims cancellation of a deed of transfer is subject to a mortgage does not render the claim excipiable. According to him, the seventh defendant that raised the issue of the bond has entered defence and has been told its rights will not be affected adversely. Counsel was referring to the seventh defendant's request for further particulars and the plaintiff's response thereto. In this connection, I do not agree with Mr. Coleman that it is amiss that Mr. Heathcote raised the point on behalf of first and second defendants. Mr. Heathcote raised the point to support the defendants' contention that a cause of action cannot be sustained because a bond has been registered in favour of an innocent third party and a rescission order will not result in the parties being put in the position they were, as if no contracts have been concluded.

[24] Mr. Heathcote referred me to a passage in *Toffe v Prudential Building Society and Others*,[25] approving a statement in *Wessels on Contract*. Since counsel relies on

[24] See *Orkin Bros Ltd v Bell and Others* 1921 TPD 92; *Food & Nutritional Products (Pty) Ltd v Neumann* 1986 (3) SA 464; *Pioneer Laundary v Ministerof National Revenue* [1939] 4 All ER 254 at 255 (Privy Council).
[25] 1944 WLD 186 at 190.

Meyer v Hessling[26] for support that the logic in *Wessels on Contract* ought to apply with equal force where a bond has been registered, it is to the latter case that I will direct my examination. Counsel has referred me particularly to the following passage from *Meyer v Hessling*:

> But circumstances are conceivable in which the rights of the seller in terms of the sales agreement might not be enforceable in consequence of the conduct of the purchaser pursuant to the transfer of the farm into his name and the registration of the mortgage bond. If, for example, the purchaser had sold and transferred the farm to a *bona fide* third party, the seller's right in terms of the sales agreement to obtain retransfer of the property to him upon cancellation of the sales agreement might not be enforceable. Similarly, if the purchaser had obtained a loan from a third party secured by a second mortgage over the farm, the seller might not be able to enforce his right to have the farm retransferred to him upon cancellation, without paying the indebtedness of the bondholder.

[25] In my respectful view, the passage, in the circumstances, does not assist the point sought to be made by Mr. Heathcote. *Meyer v Hessling*, particularly the above-quoted passage, is of no application in the present matter for two reasons: First, one of the issues that fell to be determined by the Supreme Court and to which the passage relates concerned the interpretation of paragraph 7 of the agreement of sale, nothing more nothing less. Paragraph 7 provided that in the event of the purchase price or

[26] 1992 (3) SA 851.

bond not being paid or any other provision of the agreement not being fulfilled, the seller has the right either to cancel the agreement and to take back the property or to tender transfer of the farm to the purchaser and to demand payment of the outstanding amount due to him by litigation. It was also a term of the agreement that the purchase price must be secured by registration of a first mortgage bond over the farm, the registration to be effected simultaneously with the transfer of the farm into the name of the purchaser.

[26] Thus, in *Meyer v Hessling*, the task of the Court, which relates to the above-quoted passage, was merely to interpret paragraph 7 of the agreement of sale, and in doing so in Court did not enunciate any principle of law of general application in that passage. At any rate, *a fortiori*, what the Court stated in the passage is *obiter dicta*.[27] That the statement was made *obiter* can be gathered from the passage immediately following the quoted passage: "None of these problems arise on the facts of the present case, however, and therefore do not need to be considered." That being the case, I respectfully agree with Mr. Coleman that the fact that a property in respect of which a party claims cancellation of a deed of transfer is subject to a mortgage bond does not render the claim excipiable. I do not understand the plaintiff to ask for the cancellation of the bond, and I cannot see how the reversal of ownership will thereby cancel the mortgage. Indeed, the mortgagee Bank has been cited by the plaintiff as the seventh defendant, and as seventh defendant it has already issued process, which, as I see it, is in line with initiating the steps necessary to ensure that its interests will be

[27] See *Meintjies v Joe Gross t/a Joe's Beer House* NLLP 2004 (4) 227 NLC at 230 – 231.

safeguarded if the deed of transfer (Annexure "JK7" to the plaintiff's particulars of claim) is cancelled. And on the authority of *Bouygues Offshore and Another v Owner of the MT TIGR and Another*,[28] which Mr. Coleman referred me to, it is incorrect to contend that a court can only order rescission if the result would put the parties in a position as if no contracts were concluded. *Marks Ltd v Laughton*,[29] which Mr. Heathcote referred me to, cannot give the defendants deliverance. A careful reading of the page[30] referred to me by both counsel points inescapably to the conclusion that while the general rule is what counsel for the defendants have proffered, a qualification to the general rule is also put forward in the same page, which is the thrust of the submission of the plaintiff's counsel.

[27] I now turn to the point raised in paragraph 7.2 of the notice of the exception and the submission in paragraph 16.7 of the heads of argument of the defendants' counsel, I note that the plaintiff, in his particulars of claim (paragraph 27), tenders to repay not only the purchase price of the farm, i.e. N$540,000.00, but also "any amount the court may find he received as a result of this voidable transfer." As I said previously, relying on the authority of *Telimatrix (Pty) Ltd v Advertising Standards Authority SA*,[31] which held that pleadings must be read as a whole, I find that in claiming restitution, the plaintiff has also tendered to make restitution of the amount of money he had received and "any amount the court may find he received as a result of this voidable transfer."[32]

[28] 1995 (4) SA 49 at 63-65.
[29] 1920 AD 12.
[30] At 21.
[31] *Supra.*
[32] See Christie, 3 rd ed., *supra* p 323; *Feinstein v Niggli* 1981 (2) SA 684.

Mr. Coleman conceded that “subsequent” is the wrong word. But, as I have said previously, it is fair and proper for one to read, as it should be the case, the paragraph in which “subsequent” occurs within the contextual framework of other paragraphs that relate to the prayer under attack. Having done that, I do not see how the plaintiff’s prayer in paragraph 6 of his prayers relating to the “main claim”, namely that he be ordered to pay first, or alternatively, second defendant the amount of N$540,000.00 “subsequent” to the registration of the farm in his name does make the claim excipiable.

[28] From the analyses I have made and the conclusions I have reached, it is my judgment that the first exception must fail.

First and second defendants’ second exception

[29] I now deal with the second exception, which concerns the plaintiff’s “first alternative claim”. This exception is grounded on two legal frames. The first, which is in paragraph 1.3 of the second exception, is that the allegations made by the plaintiff “in paragraph 35 and/or paragraph 36 and/or paragraph 37 and/or paragraph 38 are based on fiction;” they are not based on factual allegations; and fiction cannot sustain a cause of action. The second is that the relief claimed by the plaintiff cannot be granted “for the exact same reasons as set out in paragraph 5 of the first exception supra.” There is no “paragraph 5”: it is reasonable to assume that the reference is to paragraphs 5.1, 5.2 and 5.3 of the first exception.

[30] I have already dealt with paragraphs 5.1, 5.2 and 5.3 (the transfer and mortgage bond issues) in connection with the “main claim”, and have held that the reasons put forward by the excipients are not well founded to support the first exception. I,

therefore, do not see how they can sustain the second exception. The second exception must, therefore, suffer the same fate as far as the second ground in paragraph 1.3 of the second exception is concerned. But that is not the end of the matter: I must examine the first ground in paragraph 1.1 and 1.2 (these two subparagraphs really constitute one ground) under the "second Exception against the First Alternative Claim" to see if the second exception, based on that ground, can be upheld or not. As an alternative claim, the plaintiff alleges that on 21 May 2001 when he signed the deed of sale (Annexure "JK4" to the plaintiff's particulars of claim) he became, or was deemed to have become, owner of 50% of the shareholding in the first defendant in terms of an agreement referred to in paragraph 21 of the plaintiff's particulars of claim ("main claim"). With respect, I do not agree with Mr. Coleman that the ground of the second exception, based on paragraphs 1.1 and 1.2, is not clearly and concisely stated within the meaning of rule 23 (3) of the Rules – may be too brief, but it is clear and concise. At any rate, counsel for the plaintiff has been able to respond to it; I do not think any prejudice has been occasioned by the briefness of the ground.

[31] According to the first and second defendants, the allegations made by the plaintiff "in paragraph 35 and/or 36 and/or 37 and/or 38 are based on fiction"; they are not factual allegations, and fiction cannot sustain a cause of action. Mr. Coleman submitted that the plaintiff asks the Court to order specific performance with effect from 31 May 2001 in order to give effect to the agreement regarding the shareholding, and that, according to him, is not fiction but reality. He cites *Benson v SA Mutual Life Assurance Society* in support.[33] The passage quoted by Mr. Coleman deals with the nature of the Court's discretion in the granting of specific performance and the way in which it is to be exercised. I do not propose to examine the law any further; I do not think what Hefer, AJ proposes is in doubt. Indeed, Mr. Heathcote rather takes issue with the plaintiff's counsel's reliance on the principle of fictional fulfilment to support the plaintiff's "first alternative claim". The main thrust of Mr. Heathcote's submission is that the decision in *Wimbledon Lodge (Pty) Ltd v Gore NO and Others*,[34] and to which Mr. Coleman referred me, is not applicable in the present matter mainly

[33] 1986 (1) SA 776 (A) at 782-783.
[34] 2003 (5) SA 315 (SCA) at 10-12.

because, according to him, the "first alternative claim" is not based on fraud. Mr. Coleman denies this. He argued that the point in plaintiff's case is that he was defrauded, but if the Court finds that he could not be granted *restitutio in integrum* in respect of Annexure "JK4" and "roll back the whole set of transactions", then, in the alternative, the plaintiff is entitled to get his shareholding in the first defendant, and the transactions by the first defendant, which were fraught with fraud, should be reversed. I do not see that the plaintiff does not rely on fraud in his "first alternative claim". I am satisfied that the plaintiff alleges facts, and if he can prove them - and for purposes of the exception, I assume that he can prove them[35] - the Court can apply the principle of fictional fulfilment and may grant him relief upon the authority of *Wimbledon Lodge (Pty) Ltd v Gore NO and Others*.[36] It may be true that in form the plaintiff's plea does not in express terms set up the principle of fictional fulfilment, but in substance it does. Indeed, it has been stated that a court must look at the substantial issue between the parties and not bluntly follow the *ipsissima verba* of the pleadings.[37] It follows that the second exception cannot also be upheld.

<u>First and second defendants' third and final exception</u>

[32] I now turn to the first and second defendants' third and final exception, which are based on two interrelated grounds. Their counsel's first objection relates to Annexure "JK1" to the plaintiff's particulars of claim, which, in plaintiff's "main claim", plaintiff alleges is superseded as a result of the oral agreement (paragraph 21

[35] See *McKelvey v Cowan NO, supra,* at 526H.
[36] 2003 (5) SA 315.
[37] See Erasmus, *Superior Court Practice*, 1993 : B1-129; *Shill v Milner* 1937 AD 101 at 105.

of plaintiff's particulars of claim). But "JK1" as amended by addenda "JK2" and "JK3" (annexed to plaintiff's particulars of claim) is relied on by plaintiff in his "second alternative claim" as the "operative agreement". I do not see anything objectionable for plaintiff's abandonment of "JK1", as amended, and his reliance on it in his "second alternative claim". Pleading in the alternative is entirely permissible, and a ground, which is abandoned in a claim, may be relied on to support an alternative claim.

[33] This leads me to examine Mr. Heathcote's other submission which runs like this: In prayer 2 of the plaintiff's prayers respecting his "second alternative claim", the plaintiff prays for an order that the first and second defendants jointly and severally pay to the plaintiff the amount of N$1,207,200.00, plus interest at the rate of 20% per year calculated from 14 December 2001, alternatively *a tempore morae*. But, so the submission goes, the plaintiff cannot claim the rectified amount; he can only do so if he had given written notice in terms of Clause 9 of "JK1", as amended. In other words, from the wording of Claude 9, an action for specific performance cannot be instituted prior to the 14 days' written notice having been given. No notice has been given, so the plaintiff's claim under the "second alternative claim" is bad in law, he concludes. In support of his contention counsel refers me to *Henriques and Another v Lopes*.[38] Mr. Coleman argues that the first and second defendants' ground of exception is without substance. He referred me to a textual authority[39] and case law.[40] These authorities do

[38] 1978 (3) SA 356 at 358B-D.

[39] Christie, 4th ed., *supra* p 382.

[40] *Benjamin v Gurewitz* 197333 (1) SA 418 (A); *Humphreys v Laser Transport Holdings Ltd and Another* 1994 (4) SA 388 (c).

not, I am afraid, deal specifically with Mr. Heathcote's legal objection; those authorities concern requirements of rectification. I do not think that is in dispute. From a reading of the plaintiff's "second alternative claim", I cannot agree with Mr. Coleman's argument that the plaintiff does not rely on breach, e.g. the plaintiff "alleges that …. [h]e never received the agreed price …". That constitutes breach, in my view. Nonetheless, I cannot accept Mr. Heathcote's argument that where there has been a breach, then a party to "JK1" cannot approach the Court for relief "if he didn't give notice in terms of Clause 9 of the Agreement."

[34] The remedy in Clause 9.1 is essentially a domestic remedy. It is not different where a statute or a contract regulating the establishment and affairs of a private organization provides for the suspension or deferment of judicial process until a complainant has exhausted the domestic remedies which might have been created by the relevant statute or the constitution of the private organization. The right to judicial relief will only be suspended or deferred where "the legislation or the contract *expressly* states that the recourse to the courts is precluded until the domestic remedies are exhausted". (My emphasis)[41] I can see no reason why this proposition cannot apply with equal force to a private contract between individuals, such as "JK1". In the result, I cannot see how the plaintiff's "second alternative claim" is legally objectionable as incapable of sustaining a cause of action. That being the case, the third exception, too, fails.

[41] Baxter, *Administrative Law*, 1984: p 720.

[35] It follows that the three exceptions taken by the first and second defendants fail on all grounds.

Costs

[36] I now come to the question of costs. I have not an iota of doubt that the first and second defendants were justified in raising the matters by exception, even if in the end they have been unsuccessful. At any rate, the issues raised in the present application have been totally arguable.

Conclusion

[37] The order of the Court is, therefore, that the application is dismissed, and the matter of costs shall be held over for decision at the trial.

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Parker, A J

ON BEHALF OF THE PLAINTIFF Adv. George Coleman

(RESPONDENT)

Instructed by: Lorentz Angula Inc.

ON BEHALF OF THE Adv. R. Heathcote

FIRST AND SECOND DEFENDANTS
(APPLICANTS/EXCIPIENTS)
Instructed by: Kirsten & Co