AGREEMENT VAGUELY REFERS TO CAVEAT AGAINST PROPERTY: GROUNDS TO WALK AWAY?

Anioma Property (Pty) Ltd v DMFT Property Developers and Others (49230/2021) [2023] ZAGPJHC 209 (7 March 2023)

Purchasers are often inattentive to details when putting pen to paper to buy a property. In this judgment, the seller had inserted a note in the sale agreement stating that there was a caveat against the property, but did not elaborate. Later, the purchaser sought to resile from the agreement, using this fact as a basis to argue that the seller had misrepresented the facts. The argument failed. The Court held that, on the facts here, the purchaser was obliged to perform its own due diligence before contracting, more so in the present matter where the purchase price is substantial. And in any event, the Court held, even if the vague disclosure of the caveat constituted misrepresentation, it was not material and hence not grounds for resiling from the contract.

The Judgment can be viewed [here](#).

FACTS

Anioma Property (Pty) Ltd ('Anioma') sold its property to DMFT Property Developers ('DMFT') for R13 million. DMFT paid the full purchase price to the conveyancing attorney, but refused to pay the transfer costs for transfer to proceed. Rather, it sought to rescind the agreement on the basis that Anioma had deliberately failed to disclose that the property was being targeted by hijackers and further that, related to the hijacking, there was a caveat on the title deed to which it as purchaser was not alerted. (A *caveat* is a note made by the deeds office against a property, to remind the deeds office and other interested parties about doing something or checking something before allowing transfer or other dealings with that property. For example, if the Surveyor-General changes the description of a property, a caveat will be noted against the property. In any transfer of the land, the new description will have to be used and the caveat serves as a reminder to the conveyancer and the deeds office to comply with the necessary steps when the property is eventually transferred.)

Anioma contended that it had complied with its obligations in terms of the sale agreement and that it had ensured there was a clause in the agreement to the effect that "[t]he seller shall remove all caveats that may be placed on the property and facilitate the transfer process". Anioma further contended that there had never been an attempt to hijack the property and that whilst there indeed was a caveat against the property in the deeds office records, this caveat related to an earlier attempt by a third party to have Anioma fraudulently liquidated. In the latter process, Anioma had approached the court for an interdict to halt such fraudulent liquidation attempt and, in the process, a caveat was noted against the title deed of the property prohibiting registration of transfer without an order of court. However, after concluding the agreement with DMFT, Anioma had instructed the conveyancer to uplift the caveat simultaneously with the registration of transfer of the property into DMFT's name.

DMFT maintained that Anioma misrepresented the true state of affairs to it and that it was entitled to rescind the agreement.

Anioma approached the Court for an order for specific performance, obliging DMFT to perform in terms of the agreement. In order to resolve the matter, the Court had to determine whether: (a) the agreement was misleading when it referred to the existence of the caveat and that it omitted pertinent facts; (b) there was a legal duty on Anioma to disclose the exact nature of the caveat; and (c) the non-disclosed facts were material thereby invalidating the contract.

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HELD

- Where one contracting party has entered into an agreement or otherwise has been induced to enter into an agreement as a result of a false representation by the other party, this amounts to misrepresentation. The "innocent party" may then resile from the agreement, provided that the misrepresentation was also material (and therefore has a bearing on whether the innocent party would have entered into the contract or not).

- The duty to disclose a material fact arises when a party has sole knowledge of the material fact which the other party would have relied upon and must further be in line with the accepted good values of the community. Failure to disclose, non-disclosure is often thought of as misrepresentation by silence. As a result, the failure to disclose a material fact to the other contracting party when there is a legal duty to do so constitutes misrepresentation. Non-disclosure and misrepresentation are treated in the same manner, in that they are both grounds for rescission of the contract if one party is under a duty to disclose such facts and fails to do so. The duty is likely to arise where the relevant material fact falls within the exclusive knowledge of a contracting party.

- In the present matter, the information about the caveat was not exclusive to the seller as it was recorded in the deeds office and could be ascertained when doing a simple enquiry at the deeds office. The information detailing the history of events that led to the filing of the caveat could similarly easily be retrieved through a simple deeds search and subsequently accessed through the Deeds Office.

- In addition, there was no proof or indication that the property was ever hijacked. This, coupled with the fact that the title deed was not compromised and that all litigation regarding the alleged fraudulent liquidation of Anioma was resolved, it was reasonable to assume that an "honest man" in the circumstances would not deem it necessary to disclose the entire nature of the caveat to a purchaser.

- In as far as the specific wording that refers to the caveat goes - "[t]he seller shall remove all caveats that may be placed on the property and facilitate the transfer process" - one could, at best, conclude that it was unclear. However, as Anioma had intentionally added this clause, DMFT as contracting party should have questioned why this was so. A reasonable person in the position of DMFT would have performed a proper due diligence, especially in circumstances where the purchase price was substantial, as in this matter, and should have sought clarity on the clause to ensure that there were no issues pertaining to the title of the property.

- In any event, the non-disclosure in this matter was not material as the existence of the caveat did not affect the title deed nor did it prevent transfer from occurring. Therefore the fact that Anioma did not disclose the precise nature of the caveat was not material.

CONCLUSION

The Court accordingly ordered DMFT to pay the outstanding transfer costs and the costs of the application.