THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 407/10

In the matter between:

PRESIDENCY PROPERTY INVESTMENTS (PTY) LTD	**First Appellant**
FAIRCAPE PROPERTY DEVELOPERS CC	**Second Appellant**
VERED ESTATES (PTY) LTD	**Third Appellant**

and

SHIRAZ PATEL	**Respondent**

Neutral citation: *Presidency Property Investments v Patel* (407/10) [2011] ZASCA 73 (25 May 2011)

Coram: MPATI P, NAVSA, HEHER, BOSIELO and MAJIEDT JJA

Heard: 6 May 2011

Delivered: 25 May 2011

Updated:

Summary: Practice – pleading – reliance on cause of action not pleaded and not apparent to defendant – prejudice resulting – plaintiff held to claim as pleaded.
Contract – Fraudulent misrepresentation – sale off plan – statements as to anticipated view from property to be built no more than bona fide opinion – absence of reliance.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Davis J sitting as court of first instance):

1. The appeal succeeds with costs.

2. The order of the court a quo is set aside and replaced with the following order:

(a) The plaintiff's claim is dismissed with costs, save for the wasted costs of the postponement of 5 March 2007, which costs are to be paid by the first and second defendants jointly and severally.

(b) The first and second defendants' costs are to include the qualifying expenses of the expert witnesses Mr J van der Spuy and Ms L Marantz.

JUDGMENT

HEHER JA (MPATI P, NAVSA, BOSIELO AND MAJIEDT JJA concurring):

[1] This is an appeal, with leave of this Court against a judgment of the Western Cape High Court. In an action for damages arising from an alleged fraudulent misrepresentation Davis J ordered the two appellants jointly and severally to pay to the respondent the sum of R289 500 with interest a tempore morae and costs (including the costs of a postponement on 5 March 2007, against which order no appeal is pursued).

[2] The respondent, Dr Patel, is a medical practitioner. The first appellant, Presidency Property Investments (Pty) Ltd ('Presidency') is a company formed to carry out a sectional title development named 'The Meridian' on erven 278 and 279 Sea Point. The second appellant, Faircape Property Developers CC ('Faircape') is a property investment, development and holding company. A certain Mr Michael Vietri is the common link between them being, apparently, the sole member of the second appellant which holds a 50 per cent interest in Faircape Contractors CC which in turn holds half the shares in the first appellant. In the court a quo there was a third defendant, Vered Estates (Pty) Ltd ('Vered') a real estate agent employed by the first appellant to market apartments in The Meridian. Davis J made no order against it.

[3] The respondent issued summons against the two appellants and Vered. He alleged,

as was common cause, that he had, on 2 July 2003, concluded a written agreement to purchase an apartment in The Meridian from Presidency at a price of R2.95 million. At the time of sale, he alleged, the building was in the process of development and construction by or under the control of Presidency and Faircape or one of them; Vered was their agent to market the units off plan. (It became common cause that The Meridian was little more than a hole on the side of the hill at that time.)

[4] In his particulars of claim the respondent pleaded two distinct representations. The first was said to have been made by two employees of Vered, Mr Frank Meiring and Ms Sandra Singer, acting in the course and scope of their employment and contained two elements:

1. At a site inspection of the premises where The Meridian was to be constructed, Singer represented to him that the apartment would have an unobstructed view of the Green Point and Waterfront areas and the ocean in the north-east, north and north-west directions when viewed from the apartment.
2. Singer and Meiring presented him with a CD-ROM disk comprising marketing material in respect of the proposed development and which contained a graphic description of the apartment and, in particular, the unobstructed views from it.

[5] The respondent further alleged that Presidency and Faircape were aware of the making of the said representation by their agents and that both knew at that time that the representations were false because Presidency and Faircape intended to construct, on a site adjacent to The Meridian, and to the north-east of it, another five-storey sectional title development known as Avenue de Calais which would cause the obliteration or obstruction of the views from the apartment purchased by the respondent in a north-east direction.

[6] The second misrepresentation was an alleged failure by all three appellants to disclose to the respondent at the time of sale that:

1. the building plans in respect of Avenue de Calais had been submitted to the municipality for approval;
2. the construction of Avenue de Calais would commence shortly after approval of the plans towards the end of 2003; and
3. the construction work on that development would cause nuisance and

inconvenience to owners and residents of The Meridian apartments ‘to such an extent that beneficial occupation of those apartments could not take place for a period of approximately six months’ (by which I assume was intended, six months after the construction commenced.)

[7] The respondent went on to allege, in para 11 of his particulars of claim, that when Vered made the first representation and when the appellants failed to disclose the facts relevant to the second misrepresentation, they intended the respondent to act on each representation and into enter in the agreement ‘to pay the first defendant a purchase price which was substantially in excess of the value of the apartment and to take transfer thereof prior to the completion of the construction of Avenue de Calais’. (I assume that the higher price was not really contemplated by the pleader as a constituent of the representors’ intention but rather a consequence, since no-one at the trial considered whether such an intention had to be or was proved.)

[8] According to the allegations all the appellants were aware that Dr Patel was ignorant of the falsity of the representations concerning the unobstructed view and of the facts bearing on the delay in affording beneficial occupation; they knew that he was purchasing the property for investment purposes in order to derive rental from it upon transfer to him; nevertheless they intentionally made the representation and withheld disclosure. In consequence, according to the pleaded case, the respondent purchased the apartment for R2.95 million but was unable to let it or derive rental due to the construction work at Avenue de Calais and the nuisance so caused; moreover, he was induced to purchase the apartment for the agreed price, whereas, if he had known the true facts, he would have paid only the true value of the property with its obstructed view (alleged to be R1.95 million) less an additional amount of R100 000 on the basis of inability to derive rental income from the property until the completion of Avenue de Calais. The respondent in consequence claimed damages in the sum of R1.1 million.

[9] The respondent’s claim embodied all the elements of a delict arising from fraudulent misrepresentation both in its positive and negative senses. The respondent did not plead the making of either a negligent or innocent misrepresentation.

The judgment of the court a quo.

[10] The approach of the learned judge is perplexing. He commenced by recording that the action was one 'for damages arising out of an alleged fraudulent misrepresentation made by the defendants'. In paras 2 and 3 he set out in detail the pleaded basis of the respondent's claims and the appellants' defence. He then proceeded to set out the issues in dispute:

'[4] Given the defendants' plea, the following issues remained in dispute between the parties:

4.1 The misrepresentation, as alleged by the plaintiff;

4.2 The non-disclosure, as alleged by the plaintiff;

4.3 Defendants intended plaintiff to act upon any such misrepresentations and on non-disclosures;

4.4 Such misrepresentation and/or non-disclosure were made fraudulently by defendants;

4.5 Plaintiff was induced by the representations and/or non-disclosures to purchase the apartment at a price in excess of its true market value;

4.6 Plaintiff sustained damages in the amount of R1 100 000.00; and

4.7 Plaintiff was unable to let the apartment and derive rental income therefrom due to the construction work on Avenue de Calais and the nuisance caused thereby and thereby suffered further damages in the amount of R100 000.00.'

[11] Davis J went on to summarise the legal basis of the action as follows:

'In order to succeed, the plaintiff is required to demonstrate conduct on the part of the defendants in the form of a misstatement, whether by an act or an omission, that the statement was made wrongfully, negligently and that the act or omission caused loss to the plaintiff, both in the legal and the factual sense.'

[12] After the preceding recordal of the pleadings and the elements of the claim based on fraudulent misrepresentation and fraudulent non-disclosure inducing a contract, the learned judge's identification of the legal basis of the action as being negligent misstatement is surprising. He proceeded to address the 'requirements for a successful action' under the headings of (a) conduct, (b) wrongfulness, (c) negligence and (d) causation. He did not revert to the alleged fraud or explain why he was adjudicating a claim deriving from negligent misstatement.

[13] As to the element of conduct, Davis J held that, on the evidence, representations

were made by Mr Meiring and Ms Singer concerning the nature of the views that would be enjoyed from the apartment that they were selling to Dr Patel in The Meridian development. The representations took the form of statements about uninterrupted views of the Indian Ocean, a promotional DVD depicting the development in which views played an important part, and a general letter dated 11 March 2003 handed by them to Dr Patel which the second respondent, Faircape, had apparently prepared for previous purchasers which read as follows:

'We address you at the instance of the developers of the above scheme in which you have purchased an apartment.

This serves to confirm that by way of a Notarial Agreement binding both you (the owner) and the successors-in-title, the owner of the property fronting the development has agreed to restrict the height of any dwelling/structure thereon to not more than 52,3 metres above mean sea-level which is tantamount to being 1 metre below the ground floor of the development.'

This letter was not relied upon in the pleadings as a misrepresentation, but there were times during the trial, in the judgment of the court a quo and in the submissions made to this Court by the respondent's counsel when that fact was ignored. More important, the representation was true: the developers had procured a restriction in the height of the property immediately to the front of The Meridian development thereby protecting the view to the sea.

[14] All the representations made to the respondent concerning the view were held by the court a quo as matters influencing his decision to purchase the apartment as an investment and for resale. However, Davis J found that they did not amount to actionable representations because they

'were intended to be expressions of an opinion regarding the future and, particularly the view which could be expected from the apartment. But viewed from the position of a reasonable person, no guarantee could ever be given by a seller of a property concerning a view in perpetuity, particularly in the Sea Point area where properties are zoned general residential, as a result of which many residential developments take place.'

[15] Despite that conclusion the learned judge then continued as follows concerning the potential liability of the first appellant:

'Returning to first defendant, as Mr Patrick correctly noted, plaintiff's case was based on an argument that first defendant's representations could be classified as *dicta et promissa*. In *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A) at 418A Holmes JA said of this concept:

"A *dictum et promissum* is a material statement made by the seller to the buyer during negotiations, bearing on the quality of the *res vendita* and going beyond mere praise and commendation."

At 417A Holmes JA set out the consequences for the seller who makes a *dictum et promissum*:

"[t]he aedilitian remedy is available by operation of law. There is no need to invoke any warranty or terms or to aver the breach of either. Indeed that is one of the reasons why the aedilitian remedy is useful to buyers."

In essence, what was decided in *Phame v Paizes* was that a purchaser who has been misled by an innocent misrepresentation of the seller which amounts to a dictum et promissum (as will usually be the case), will be entitled to "restitutional damages" in the form of a reduction of the purchase price. See *Wille's Principles of South African Law* (9th ed) at 778; Christie *The Law of Contract* (5th ed) at 300. Such an action (the *actio quanti minoris*) as developed in *Phame v Paizes* is one which does not appear to be excluded in terms of clause 30. . . For these reasons, it cannot be said that negligence has been proved against third defendant nor that it made *dicta et promissa*. But, by making a *dictum et promissum* the first defendant is liable by operation of law, . . .'

[16] With regard to the last-mentioned finding, the learned judge did not make clear which of the representations attributed in the pleadings to the third defendant he regarded as a *dictum et promissum* of the first appellant. Nor did he explain how, if such statements were mere opinions as to an unpredictable future in the mouths of the first appellant's agents, they metamorphosed into 'material statements ... going beyond mere praise and commendation' which were to be held to the account of the first appellant. It should be pointed out that the evidence did not establish that the first appellant knew that the verbal statements had been made by the agents nor that it had authorised them. Nor did the respondent seek to prove that the first appellant was aware that the agents had shown or made the DVD available to him, although there is no dispute that it was given to them to be used as a marketing tool.

[17] As regards the first appellant's liability Davis J found that

'defendants were aware of the importance of the view for a purchaser of Meridian. They exploited this very point in their marketing campaign. On the basis of Mr Vietri's evidence, first and second defendants knew that the construction of Avenue de Calais would commence towards the end of 2003. Further, it was clear that the construction of Avenue de Calais would unquestionably cause a significant obstruction to the view of the Meridian, especially the view from the north-east direction.'

[18] The finding of Davis J in respect of the second appellant was as follows:

'. . . second defendant's failure to speak was clearly negligent in the circumstances of this case and viewed through the prism of the common law . . . cannot be saved by recourse to clause 30.'

Here too it should be noted that the only act of omission alleged against the second defendant in the pleadings relates not to the view but to the construction of Avenue de Calais and its consequences on beneficial occupation of the apartments in The Meridian.

[19] With regard to the judgment of the court a quo I agree with counsel for the appellants that:

1. The learned judge failed to judge the case according to the pleaded cause of fraudulent misrepresentation.
2. His finding that the first appellant was liable on the basis of a *dictum et promissum* was inconsistent with his conclusion that the pre-agreement representations did not constitute actionable representations and were expressions of an opinion regarding the future.
3. If the statements qualified as *dicta et promissa*, clause 30 of the sale agreement probably presented a bar to the claim. Some reference will be made below to the contractual terms, but, for reasons which will become apparent, it will be unnecessary to decide their effect on the rights of the parties.
4. As I have noted, the finding that the second appellant was liable on the basis of a fraudulent non-disclosure was not justified by reference to the pleaded issues. Nor, if second appellant were to be liable on the basis of negligent non-disclosure outside the contractual context (as here), was any basis laid for the existence of a legal duty to disclose. Whether that appellant, as a party not involved in the development, could have been under a legal duty to speak was not ventilated at the trial as the question was not raised. As counsel submitted, Davis J seems to have treated the first and second appellants on the same basis simply because the companies were indirectly related in having Mr Vietri as a common director and shareholder. Aside from the fact that the letter I have quoted earlier concerning the height restriction on the front property appears to have emanated from it, the second appellant was not shown to have played any role whatsoever in relation to the development or construction of the property, the marketing and sale of The Meridian, the instructing of Vered, or the negotiating and sale to the respondent.

Neither was there evidence that it was involved at all with the planning, development or construction of Avenue de Calais. Finally there were no grounds even to suspect that in concluding the agreement on behalf of the first appellant Vietri was wearing the hat of the second appellant. In the circumstances the order made against the second appellant was unfounded.

The true cause of action against the first appellant

[20] The judge in the court below and counsel in this court agreed that the pleaded case was founded in fraudulent misrepresentation. No reliance was placed on an innocent or negligent misrepresentation. But counsel for the respondent argued, as he had apparently done with profit before Davis J, that judgment for a reduction in the purchase on the strength of an *actio quanti minoris* was competent. He submitted that, despite clothing the claim in delictual habiliments, it contained the requisites for the actio viz the making of representations warranting a reduction in the purchase price. He cited *Phame (Pty) Ltd v Paizes* at 407E-408G and 420E. In that case the plaintiff pleaded and relied on an innocent misrepresentation in a claim for a reduction of the price in an agreement for the sale of shares and loan accounts. The defendant excepted to the claim on the ground the summons lacked averments necessary to found or sustain a cause of action. The question which the judgment answers is whether an innocent misrepresentation can ever entitle a buyer to a reduction of the price under the *actio quanti minoris* and, if so, the factual foundation required for such a claim. The Court held, inter alia, that the aedilitian remedies are available against a seller who makes a *dictum et promissum* to the buyer on the faith of which the seller enters into a contract or agrees to the price in question and the *dictum et promissum* turns out to be unfounded. At 420D Holmes JA said:

'I would add that the pleadings do not aver a term or a warranty; and the plaintiff's case was not presented to us on the footing of any such averment. In all these circumstances, taking a practical view of the pleadings, in relation to a contract of such financial magnitude, entered into after meticulous calculation as to expresses and returns, I do not think it can be said that they are incapable of being read as laying a foundation for a material statement by the seller going beyond mere praise [and] commendation.'

It seems clear that a representation made fraudulently is capable of qualifying as a *dictum et promissum* whether for the purposes of the aedilitian remedies if the other requisites are satisfied or simply to justify a reduction in the price. See Grotius 3.15.8 quoted in *Phame*

(Pty) Ltd v Paizes at 411G-H, Prof A M Honore, *ibid* at 412C and *cf* Cujacius, *ibid* at 412G-H.

[21] The general principles governing the interpretation of pleadings have often been referred to by this Court. See particularly *Stead v Conradie en Andere* 1995 (2) SA 111 (A) at 122A-I and the authorities there cited. It may well be that a putative claim may be winkled out of a clearly pleaded cause of action sufficient to support another barely discernible cause. This case probably provides such an instance. Such recognition of the concealed cause would be at odds with the object of pleading, viz clear and precise definition of issues, and be an invitation to misleading formulation of claims. As such the party seeking to rely on it will necessarily require special circumstances to persuade a court to come to his assistance. In the end however he will have no leg to stand on if recognition can only be afforded to the prejudice of the opposing party or at the cost of proper investigation into the emerging issue. This again in my view is such a case.

[22] Counsel for the appellants has attempted to persuade us that the exemption contained in clause 30 of the contract nullifies the respondent's reliance on a *dictum et promissum* made innocently. His opponent's riposte was that this court requires such reliance to be pleaded, citing *Mutual & Federal Insurance Co Ltd v SMD Telecommunications CC* 2011 (1) SA 94 (SCA) at 103B. But the reason it has not been pleaded is because of the respondent's specific reliance on fraud as an inducing factor to the contract which rendered such a plea irrelevant in law. There are other provisions in the contract which at first reading could with some prospect of success have been relied on by the appellants but were not, perhaps for the same reason. These include clause 14.4,

'Save as specifically set out in this Agreement the Seller has made no representations and given no warranties in respect of the subject matter of this Agreement or in respect of anything relating thereto and this sale is accordingly voetstoets.'

and clause 8.2,

'On or before the Occupation Date of which notice has been given to the Purchaser, the Seller shall request the Architect to certify that the Section is available for Beneficial Occupation. A Certificate signed by the Architect that the Unit is available for Beneficial Occupation shall be binding on both parties . . .'

[23] Whether or not the appellants would have placed reliance on the contractual provisions with success is of little consequence. What is of importance is that because of the manner of pleading which he adopted the respondent deprived the appellants of the opportunity to do so. Neither party has applied to amend its pleadings. To permit what in substance amounts to a tacit amendment at this stage would be unfair to the appellants. In my view the trial court should have adjudicated the claim at its face value as an action in delict to recover damages for fraudulent misrepresentation and this Court should test the appeal on the same assumption.

Was a representation proved and, if so, in what terms?

[24] I shall first consider the representations concerning the view. Dr Patel was a single witness in this regard. He was a honest witness but he testified on 9 September 2009, more than six years after the event. In the circumstances it is hardly surprising that his recall of what was said to him by the agents was inconsistent. His evidence in chief makes only indirect reference to oral representations by the agents:

'You told us that when you first went into the house in Ocean View Frank and Sandra told you about a new development, the jewel in their crown, that would take place. Did they tell you who would be developing the property? ---

Not on the Sunday, but during that week I went to their office. They then took me to Ocean View Drive from which we had the view that I was to get in purchasing at 4, the Meridian. The development they told me was being done by Faircape, and they took me back to the office to show me the CD Rom which we saw earlier here, and I took it home and showed it to a couple of my friends for the next few days, and by Friday they had come with the offer to purchase.'

. . .

'Well, from Ocean View Drive right up above the point where the Meridian was to be built, we had panoramic views of the west side of Sea Point on the left, and the Waterfront and Green Point Common on the right.

What did Frank and Sandra tell you about where the Meridian would be built? --- The point on your map marked "A", that is where the Meridian was to be built.

And what did they tell you about the apartments in the Meridian? --- They said it's an excellent investment; it's one apartment per floor. It's unique and there's a distinction made between the development next door, which was Crystal Springs, which is right next door but it didn't have one apartment per floor. *Panoramic views*, exclusivity, three parking bays and it was a jewel in their crown. (My emphasis.)

And then you said you went back to their office and it was there that they showed you the CD Rom or the DVD, and that you took that home. --- Yes, I took that home. I was very excited with this. I took it home, I showed it to a couple of my friends and I expressed a keen interest in acquiring an apartment there. We had some telephonic conversations during that week and ...
"We" being? --- Myself and Frank and myself and Sandra. And I said to them I'm very keen. They said it was the only one left so I must move fast, and by the Friday afternoon, evening – 6 o'clock, they came home – when I got home they had been there, the documentation was there, and I signed an offer to purchase, which was on the 27th June 2003.
For what purpose did you wish to buy the apartment? --- I bought this apartment – it's an investment. I was involved in other such deals previously where we put in the 10% deposit and before transfer takes place, because it takes about a year for transfer to take place, we'd re-sell the thing and realise a huge profit on our 10% deposit.
And what did the agents say about that? Did you convey that to them? --- They said for various reasons it was an excellent investment. The location was excellent, the *panoramic views were superb and unparalleled*, one apartment per floor was unique. So I was excited about it, and I thought – and I concurred with them that, you know, this is a valuable piece of – an apartment.' (My emphasis.)

[25] He was also given the general letter earlier referred to on the letterhead of the second appellant. Under cross-examination he testified as follows:
'Well, I thought – I like Ocean View Drive. The views were fantastic. I didn't know exactly about the merits of the development itself, but I liked the views, and then he said when we get to the office – he also told me at that point that there were height restrictions, that nobody will be able to build up in front of you, that the view you get here is the view you're going to have. We went back to the office, we looked at the CD Rom, I took the CD Rom home and a few days later we signed the offer to purchase.'
. . .
'Well, my day trip to the site on Ocean View Drive, we had this panoramic view, the said the Firmount building – the Meridian – was coming on here, and *expressly told me that no further developments will be taking place in front of you*. When we went back to the office *they showed me this generic letter confirming what they had told me* at the – on Ocean View Drive.' (My emphasis.)
As to the signing of the offer to purchase, Dr Patel said:
'They were sitting at my dining room table. There's always a bit of apprehension when you buy something that expensive, and whether it was Sandra or whether it was Frank, they said, don't worry, Doctor – this is a good investment. I said, look, I'm happy with it, I'm happy with the CD

Rom. I've shown it to a couple of my friends. Everybody likes it, and I'm glad to go ahead. I signed the Deed of Sale that evening.

Now, did you read the Deed of Sale? --- More or less.

Are you aware what it says about representations and so forth, relating to such things as a view? --- No.'

Under further cross-examination the appellant gave this more detailed account of his visit to the proposed site of The Meridian with the agents:

'No, sir. It was specifically mentioned that you will be standing, like we are standing here on Ocean View Drive, with the height restriction of the agreement in front, with the person in front of the Meridian, *you'll have sweeping views, and sweeping views from the Waterfront on the eastern side right across to the western side of this thing*, whether you're in your living room or your balcony, you'll have these views. From your bedroom you'll be able to see the Waterfront, or the east sun will be coming in that side from the Waterfront.' (My emphasis.)

Finally he testified as follows:

'I felt, the price I was paying, I was paying close onto R3 Million, and I needed to know what was happening in the area, and – or especially because the agents had told me we're going to have unobstructed views, which they admitted in a subsequent letter to me.'

The letter to which Dr Patel referred was one sent by the appellants' attorneys on 19 February 2005 which contained the following statements:

'It is admitted that in and during October 2002[1] our clients' agents did inform your client that at the time of erecting the development known as The Meridian *they anticipated that there would be unobstructed views of Green Point*, The Waterfront areas and the ocean to the north-east.

Our clients emphatically deny that at that time they were aware of the Avenue de Calais development nor were they aware that such a development would obstruct your client's views. In the circumstances our client denies that there were any misrepresentations and/or non-disclosures made and any action instituted will be defended.' (My emphasis.)

[26] Mr Meiring was the only witness called on behalf of the appellants on this issue (Ms Singer being unavailable). He confirmed the correctness of the contents of the letter of 19 February 2005 and that confirmation was not challenged in cross-examination. He did not dispute the truth of the respondent's various descriptions of what had been said and done prior to the signing of the offer to purchase.

[27] The evidence thus established that the agents

[1] At the trial it was common cause that this date was a mistake and that the correct date should have been

(a) told Dr Patel that they anticipated that the views from the proposed apartment would be ‘unobstructed’ (and perhaps, ‘panoramic’ and ‘sweeping’).

(b) demonstrated the breadth and panoramic scope of such views on site;

(c) handed to him a CD-ROM which provided a conceptual vision of the developed site that emphasized the range and attractiveness of the view.

Did any or all of this constitute an actionable representation?

[28] In order to constitute such a representation the statement or assertion must relate to an ascertainable fact as distinct from a mere expression of opinion: see *Jones v Mazza and Another* 1973 (1) SA 570 (R) at 572B-573E, although a dishonest opinion as to a future event may be sufficient to found an action for fraudulent misrepresentation in so far as it falsely reflects the state of mind of the representor: *Van Heerden and Another v Smith* 1956 (3) SA 273 (O) at 275-6. As in many other cases what is decisive is a holistic view of the terms of the representation and the context in which it was made.

[29] The evidence discloses that

(i) both the oral and graphic representations were made in the course of a sales pitch by the agents and, not, it would seem, in answer to direct questions by the respondent;

(ii) the subject matter was the future qualities of a fourth floor apartment in an as yet unerected building, qualities which depended not on the design or location of the building so much as upon the development of other properties in the vicinity of the building over which neither the agents nor the seller exercised control;

(iii) the representation was not limited as to time;

(iv) the agents probably expressed themselves in terms which conveyed no more than their opinion of the future state of the view. All these matters were as apparent to the respondent as they were to the agents. Although the agents made an express representation concerning the height restriction over ‘the property fronting the development’, the respondent was not misled by this into believing that it extended to the property on which Avenue de Calais was eventually erected; his grievance was the agents’ supposed non-disclosure which he expressed as follows:

‘I took it that they would have told me, knowing about the one at Avenue de Calais, because they expressly tried to encourage me to buy this property based on the fact that nobody will be building

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June 2003.

in front of you.'

[30] While the fact that a person has relied upon a statement is not decisive on the question of whether the representation in the statement is actionable, evidence that he or she did not rely on it is a strong indication against a finding that it was intended to be taken seriously. (This is of course distinct from the requirement that a representation, in order to ground an action, must have been relied upon by the representee, ie induced him or her to act upon it or to withhold action.) In the present case Dr Patel was asked by counsel, 'But obviously no developer can guarantee a view – you accept that?' He replied:

'I accept that. I accept that no – I even thought to myself when the transfer took place and I went to the Department, I said, tough luck, these guys are building in front of us. Its only when I found out that Faircape were the same developers, that's when I said, you know what, this is not right. And that's when I decided to go to Council to establish did they have intent to build this before they sold it to me, or did they just decide subsequently to buy and sell it to me. So that is my whole point of trying to establish my case, you know – the same developer misleading me.'

So Dr Patel did not regard either the agents' statement or the visual representation of the CD-ROM as grounds for complaint – they were what he expected in the circumstances. What irked him was the failure of the seller to inform him before transfer that at the time the contract was concluded the same developers were intending to erect a building that would obstruct the view from his Meridian apartment.

[31] Taking all the considerations I have referred to in the preceding paragraph into account I am left in no doubt that the agents were not party to an actionable misrepresentation, as indeed the learned judge a quo initially concluded. No more, of course, could the first appellant be held to a 'representation' by its agents which was not actionable.[2]

[32] The case pleaded against Presidency in relation to the view was never that it had fraudulently withheld disclosure that it intended to erect, or contemplated the erection of, a building on the Calais Road site which it foresaw might obstruct the view from The Meridian, and that it was under a duty to disclose that fact to the respondent as a

[2] This being the conclusion, it follows that the respondent would likewise have been bound to fail in his reliance on a *dictum et promissum: Phame (Pty) Ltd v Paizes* at 418A.

purchaser or prospective purchaser of an apartment in The Meridian. The only relevance of the non-disclosure of its awareness of the development of Avenue de Calais was in the context of the claim for damages arising out of the alleged interference with or deprivation of beneficial occupation.

[33] Although not strictly necessary, I will deal briefly with the claim for damages flowing from the alleged non-disclosure. It is sufficient to draw attention to the following shortcomings – in the respondent's case – in the evidence:

1. The first appellant (in the person of Vietri) was not shown to have been aware that:

(i) the respondent purchased the apartment for investment purposes or letting; or that

(ii) the construction of Avenue de Calais would have any adverse effects on ownership or occupation of the Meridian apartments;

(iii) and, in consequence, was never proved to have been under a duty of disclosure to the respondent at the conclusion of the sale that the Calais Road development was in the offing.

2. There was no evidence that the respondent was prevented from letting his apartment, after the completion of The Meridian, by the construction of Avenue de Calais or that he received a reduced rental in consequence of that activity.

[34] The learned judge erred in awarding the respondent a reduction in the purchase price on the basis of the *actio quanti minoris*. If he had tried the case as pleaded, viz as one for damages for fraudulent misrepresentation he must necessarily have dismissed the action against both appellants for the reasons I have given.

[35] In the result the following order is made:

(a) The appeal succeeds with costs.

(b) The order of the court a quo is set aside and replaced with the following order:

1. The plaintiff's claim is dismissed with costs, save for the wasted costs of the postponement of 5 March 2007, which costs are to be paid by the first and second defendants jointly and severally.

2. The first and second defendants' costs are to include the qualifying expenses of the expert witnesses Mr J van der Spuy and Ms L Marantz.

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J A Heher
Judge of Appeal

APPEARANCES

APPELLANTS:	S P Rosenberg SC (with him P A Corbett)
	Smith Tabata Buchanan Boyes, Cape Town
	E G Cooper & Majiedt Inc, Bloemfontein
RESPONDENT:	R Patrick
	Cliffe Dekker Hofmeyr, Cape Town
	McIntyre & Van der Post, Bloemfontein