NOT REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 967/2010

In the matter between:

DEZZO PROJECTS CC **Applicant**

and

VICTORY PARADE TRADING 81 (PTY) LTD **Respondent**

JUDGMENT

GORVEN J:

1]The applicant seeks to enforce a settlement agreement concluded with the respondent. It is common cause that this agreement was concluded by way of an interchange of correspondence between the two sets of attorneys representing them in a dispute. The dispute arose as a consequence of a contract concluded between the parties. This involved the applicant commencing construction work for the respondent. The contract was cancelled. The applicant says that this was because the respondent failed to settle two payment certificates. A dispute ensued as to whether the applicant was entitled to exercise a builder's lien and as to what payment, if any, was due. This dispute resulted in the settlement agreement.

2]The terms of the settlement were that the respondent would pay the applicant R 400 000.00 in full and final settlement of the applicant's claim. This was to be paid on 16 October 2009. It seems likely that this latter aspect was varied by way of a

request from the respondent on 13 October 2009 for a tax invoice to be rendered in that sum. The applicant acceded to this request. The tax invoice, dated 21 October 2009, was despatched, first by telefax on 22 October 2009 and thereafter by Docex on 16 November 2009. I will assume that it was received no later than 17 November 2009.

3]The respondent opposed the application. In its answering affidavit it claimed that the applicant caused the building to encroach on the municipal building line. It further claimed that, at the time the settlement agreement was concluded, it was unaware of this. It asserted that the applicant must have or should have been aware of the encroachment. It will be useful to set out precisely what the respondent said in this regard, since it forms the basis for the only defence raised. Paragraphs 9 to 14 are set out below without any corrections:

> 9.
>
> During the course of such settlement negotiations and indeed at the time the agreement of settlement which forms the subject matter of the application was concluded the respondent and I as its duly authorised representative in relation to its Ambassador Hotel project were not aware that in the construction work that had already been completed by the applicant, it, the applicant had encroached upon the building line ie. it had gone beyond the point to which it was permissible by law for construction to extend.
>
> 10.
>
> The said encroachment and breach of the building regulations is serious and material as described in the expert report, annexed hereto, marked “B". I respectfully request that this report be read as if specifically incorporated herein.

11.

The applicant must have been aware as at the date when the agreement of settlement was concluded that there was this major defect in the construction work which it had rendered for the respondent. However, it did not draw such defect to the attention of the respondent or to me as the respondent's duly authorised representative. This constitutes intentional misrepresentation through such non-disclosure.

12.

Had the respondent ie. through me or otherwise been aware of such major defect in the construction work rendered by the applicant, the respondent would most certainly not have concluded the agreement of settlement in terms whereof it agreed to pay to the applicant the sum of R 400 000.00 including VAT.

13.

Should the applicant attempt to argue that it was unaware of this major defect in its workmanship, this would be incredulous, as the most basic requirement relating to construction work is to ensure that the structure being constructed is erected where it is supposed to be.

14.

14.1 It is precisely for this reason that I did not focus on this aspect during the course of such construction or thereafter during the course of settlement negotiations and indeed as at the date when the settlement agreement was concluded. I discovered this major defect just before the time when the respondent was to make payment of the said sum of R 400 000.00 including VAT to the applicant, pursuant to the agreement of settlement.

14.2 I then commenced investigating the implications of such major defect and the costs of remedying same, if that were possible and for that reason the said sum of R 400 000.00 was not paid.

4] These were the only averments concerning the defence. The report annexed

was not supported by way of an affidavit deposed to by the author. In addition, a diagram said to have been prepared by a land surveyor was annexed to the report. The report based its conclusions on this diagram but no affidavit by the land surveyor was put up. No application was brought to have this evidence admitted under s 3(1) of the Law of Evidence Amendment Act 45 of 1988.

5]The respondent went on to aver that the applicant had intentionally failed to disclose that such a major defect existed. This, it said, amounted to a misrepresentation. It averred in the alternative that if the applicant was negligent in encroaching upon the building line but was not aware that it had done so, this would also vitiate consent to the settlement agreement on the part of the respondent.

6]The applicant, in reply, denied paragraphs 9 and 10 set out above. It said that the project was still at an early stage when its work was stopped. The applicant further stated that it had commenced construction in accordance with the pegs placed on the site by the surveyors appointed by the respondent. The applicant said that it could not have become aware of any such alleged encroachment, since the stage in the construction had not been reached when the applicant would normally have checked and cross checked measurements on the ground floor before proceeding to the next floor. The applicant further made the point that the respondent, unlike the applicant, had had every opportunity to investigate the position prior to concluding the settlement agreement. At that stage, the respondent was in occupation of the building site and had been for some four to five months. The applicant then referred to a report, commissioned by it as a result

of the answering affidavit of the respondent, from Singh & Associates who are topographical engineers and GPS surveyors. According to this report, which was also not covered by an affidavit, the applicant said that "the only so called encroachments that [Singh & Associates] could find in respect of the alleged boundary line was that column number 3 is of a slightly enlarged thickness, which could easily have been remedied by the Applicant, had it been on site." It can therefore be seen that the applicant's reply did not admit that any encroachment occurred. It talked of "so called encroachments" and an "alleged boundary line". The respondent did not apply to submit a further affidavit dealing with these averments.

7]In summary, therefore, the applicant said the following:

1. It disputed that the construction work done by it encroached on the building line.
2. It did not know at the time of concluding the settlement agreement that the construction work may have encroached on the building line.
3. There was no means for it to have established if the construction work done by it encroached on the building line since it set out the work according to pegs placed there by a surveyor and did not reach the stage in the project where it would have conducted any independent checks.

8]The heads of argument submitted on behalf of the respondent submitted that a tacit term should be imported into the settlement agreement to the effect that, if the underlying assumption of the parties that the building works carried out by the

applicant did not encroach on the building line was not correct, the contract would not be binding. This appears to have been based on some form of mutual mistake such as was dealt with in the dicta in *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd & others*[1] to the following effect where the court approved the following passage in Williston on *Contracts*[2]*:*

> It should be observed, however, that even a compromise may be based on the assumed existence of some fact, and then may be set aside for mutual mistake as to such basic assumption like any other contract.

9] The underlying reasoning for this approach was elaborated on in *Wilson Bayly Holmes (Pty) Ltd v Maeyane & others*[3] where the following was said:

> Both in the case of a mistake going to motive, and a mistake relating to an underlying assumption, what is in issue is a mistaken belief by the parties at the time they contract that a particular state of affairs exists. What determines whether the contract is invalid is whether the parties have agreed, expressly or tacitly, that this should be the consequence if the state of affairs does not exist.

10]The submission in the heads of argument to the effect that a tacit term had to be imported relating to the underlying mistaken assumption of the parties as to a lack of encroachment was abandoned by Mr *Kissoon Singh, SC*, who did not prepare the heads of argument but who appeared for the respondent at the hearing. I therefore need say nothing more on that score other than that, in the light of the evidence, I consider this concession to have been properly made in the circumstances.

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1 1978 (1) SA 914 (A) at 923
2 3rd ed, vol 13, para 1543 pp 75-76
3 1995 (4) SA 340 (T) at 344A-B

11]The submission of Mr *Kissoon Singh* in argument was along the lines set out in the answering affidavit to the effect that there had been a material non-disclosure amounting to a misrepresentation on which the respondent had relied in concluding the settlement agreement. This therefore vitiated the settlement agreement. He conceded that the non-disclosure had not been fraudulent but contended for either a negligent or innocent non-disclosure.

12]It is so that silence can amount to a misrepresentation. There is, however, no general rule in our law that all material facts must be disclosed and that any non-disclosure therefore amounts to misrepresentation by silence.[4] The underlying rationale for this approach was explained in *ABSA Bank Ltd v Fouche*[5] in the following words:

> That accords with the general rule that where conduct takes the form of an omission, such conduct is *prima facie* lawful (*BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) at 46G - H). A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him 'would be mutually recognised by honest men in the circumstances' (*Pretorius and Another v Natal South Sea Investment Trust Ltd (under Judicial Management)* 1965 (3) SA 410 (W) at 418E - F).

The court went on, in relation to actionable misrepresentations, to say the following:[6]

> Having established a duty on the defendant to speak, a plaintiff must prove the further elements for an actionable misrepresentation, that is, that the representation was material and induced the defendant to enter into the contract. In the case of a

4 *Speight v Glass & another* 1961 (1) SA 778 (D) at 781H
5 2003 (1) SA 176 (SCA) para 5
6 Para 6

> fraudulent misrepresentation, that must have been the result intended by the defendant (*Ex parte Lebowa Development Corporation Ltd* 1989 (3) SA 71 (T) at 103F - J).

13]In relation to the non-disclosure contended for in the present matter, therefore, the following is the position. First, the applicant must have had actual knowledge of the encroachment relied upon by the respondent. Secondly, there must have been a duty to disclose that fact to the respondent. Put another way, the respondent must have been in a position where it had perforce to rely on the applicant in order to obtain knowledge of the encroachment. Thirdly, this non-disclosure must have been material. Fourthly, it must have induced the respondent to conclude the settlement agreement.

14]As regards the first of these, Mr *Kissoon Singh* submitted that the applicant must have been aware of the encroachment since it was a specialist in the field. Apart from the obvious question whether the respondent established that there was in fact an encroachment and assuming in its favour that it did, without deciding the point, the difficulty with this submission is that the respondent put up no evidence in support of it. It did not say, for example, that the applicant had itself established the location of the beacons on the property in order to set out the building works. It did not even say that the applicant had not built according to the plan given to it by the respondent. The replying affidavit says that the applicant did not have the opportunity, whilst doing the work or at any time prior to concluding the settlement agreement, to check the measurements set out by the surveyor who had marked out the site with pegs on behalf of the respondent. This evidence was not contradicted or challenged by the respondent. It did not gainsay the applicant's

evidence that it commenced the work in accordance with the surveyor's pegs placed on the site or claim that the applicant knew that these pegs had been incorrectly placed. In short, that the applicant must have had knowledge was a bare assertion made by the respondent without any factual foundation. I can accordingly find no basis for concluding that the applicant had knowledge of the encroachment alleged by the respondent at the time the settlement agreement was concluded.

15]As regards the second of these, it is clear that the respondent was in occupation of the site at the time. It gave no evidence why, despite the dispute regarding payment for the work done by the applicant, it was obliged to rely on the applicant's knowledge of the encroachment, even assuming that it had proved that the applicant possessed that knowledge. On the contrary, the applicant stated that only the respondent was in a position to obtain that knowledge by the time the settlement agreement was concluded. There can therefore be no finding that, in the case of the settlement agreement, the respondent was placed in a position of involuntary reliance on the knowledge of the applicant about the encroachment and, accordingly, that a duty rested on the applicant to disclose any such knowledge had it possessed this knowledge.

16]Even if I am wrong on whether the applicant was aware of the encroachment at the time of the conclusion of the settlement agreement and as to the duty on the applicant to disclose this, the misrepresentation must also be material for it to vitiate a contract as was submitted by Mr *Wallis*, who appeared for the applicant. The only evidence is the concession by the applicant in reply that the thickness of

column 3 was not within an acceptable tolerance. This does not amount to a material misrepresentation. The applicant stated that this could have been easily and inexpensively remedied by the applicant if it was drawn to its attention at the time it was on site. The respondent relied for materiality on the report annexed to the answering affidavit. This sets out a number of permutations which may result from the alleged encroachment. The report does not mention which of these, in the opinion of the writer, was likely to happen. The permutations range from a total demolition of the building to an application to the municipality to relax the building line. The lack of particularity makes it impossible to find that any failure to mention the encroachment was material.

17]It is therefore clear that the respondent has failed to raise a basis on which it can be concluded that the applicant is not entitled to enforce the settlement agreement.

18]It is common cause that a settlement agreement was concluded between the parties which required the respondent to make payment to the applicant. The respondent has failed to do so. In the result, I consider that the applicant is entitled to the order prayed for in the notice of motion. Interest will run from the date on which the respondent received the tax invoice, 17 November 2009.

19]The following order shall issue:

The respondent is directed to:

1. Make payment to the applicant in the sum of R 400 000.00.
2. Pay interest on the said sum of R 400 000.00 at the rate of 15.5% per annum from 17 November 2009 to date of payment.
3. Pay the costs of the application.

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GORVEN J

DATE OF HEARING:	15 February 2011
DATE OF JUDGMENT:	26 February 2011
FOR THE APPLICANT:	Adv PJ Wallis, instructed by Garlicke & Bousfield Inc.
FOR THE RESPONDENT:	Adv AK Kissoon Singh SC, instructed by Rakesh Maharaj & Company. Locally represented by Pat Poovalingham & Hassan.