IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD IN DURBAN

Heard on 12 & 13 June 2012 **CASE NUMBER**: **LCC112/07**
Before **Mpshe AJ**
Decided on: 27 September 2012

In the case between:

PATHMANATHAN RUNGANATHAN NAIDOO Plaintiff

and

THE LAND CLAIMS COMMISSION 1st Defendant
THE MINISTER OF RURAL DEVELOPMENT & LAND REFORM (PREVIOUSLY KNOWN AS THE MINISTER OF LAND AFFIARS 2nd Defendant

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JUDGEMENT

MPSHE AJ:

Introduction

[1] This is a matter commenced by way of Notice of Action. The plaintiff herein seeks an order to set aside an agreement entered into between plaintiff and the Minister of Rural Development & Land Reform, the second defendant. The said relief is premised on the alleged misrepresentation by the officials of the defendants which misrepresentation, as alleged, induced the plaintiff to enter into the said agreement.

It is submitted further that due to the misrepresentation, the said agreement is rendered void or voidable. The second relief is to request the court to determine the amount of compensation due to the plaintiff. However, the second claim is not before court. It was agreed that the merits be separated from the quantum.

The statement of claim reads as follows:

1.

" The plaintiff is **PHATHMANATHAN RUNGANATHAN NAIDOO**, an adult businessman who resides at 9 Westmeath Avenue, Bonella, Durban, KwaZulu-Natal.

2.

2.1 The first defendant is **THE COMMISSION ON RESTITUTION OF LAND RIGHTS**, a Commission established in terms of section 4 of the Restitution of Land Rights Act, 22 of 1994 ("the Restitution Act") and which consists *of inter alia* a Chief Land Claims Commissioner and Regional Land Claims Commissioners, including the Regional Land Claims Commissioner for KwaZulu-Natal. The principal place of business of the Regional Land Claims Commissioner, KwaZulu-Natal is at 4th floor, Commercial City, Commercial Road, Durban, KwaZulu-Natal and the head office of the Commission is at 184 Jacob Mare Street, Pretoria, Gauteng.

2.2 The second defendant is **THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM (PREVIOUSLY KNOWS AS THE MINISTER OF LAND AFFAIRS)**, who is cited herein in his capacity as Minister as defined in the Restitution Act and also a responsible minister representing the Department of Rural Development and Land Reform ("the Department") and the State in terms of section 2 of Act 20 of 1957, c/o the State Attorney, 6th floor, Metropolitan Building, 391 Smith Street, Durban, KwaZulu-Natal.

3.

The plaintiff's father, the late Runga Nattan, an adult man with identity number: 00911 5007 057 was the registered owner of the following properties namely:

3.1 Plot 2822, Pinetown township, situate in the Borough of Pinetown (also known as the remainder of Erf 2822, Pinetown), in extent 19537 m², held by virtue of Deed of Transfer no: 3086/1944;

3.2 Lot 2823, Pinetown township, situate in the Borough of Pinetown (also known as Erf 2823, Pinetown), in extent 23580 m², held by virtue of Deed of Transfer 3086/1944;

3.3 Lot 2408, Pinetown township, situate in the Borough of Pinetown, in extent 1 619 m², held by virtue of Deed of Transfer 10104/1947;

3.4 Sub 9 of Lot M of Lot 1 no. 1550, situate in the City of Durban (also known as Erf 1550, Durban North, 1579.3 m² in extent and held by virtue of Deed of Transfer 2309/1948;

3.5 Subdivision 3 of Lot F of the farm Buffels Bosch no. 965, situate in the City and County of Durban (also later known as the Remaining Extent of Portion 3 of the farm Buffelsbosch no. 965), in extent 148 605 m² and held by virtue of Deed of Transfer 11250/1948;

3.6 Sub 411 (of 1 of F) of the farm Buffels Bosch no. 965, situate in the City and County of Durban (later known as Portion 411 of 121 of the farm Buffelsbosch 965), held by the said Runga Nattan in undivided shares with the plaintiff and one Loganathan Munsamy Naidoo, born on 18 February 1926, by virtue of Deed of Transfer no. 11622/1969;

3.7 Sub 50 (a subdivision of Sub 43) of the farm Kraans Kloof no. 867, situate in the County of Durban (now known as Portion 50) (a portion of Portion 43) of the farm Kraans Kloof 867, in extent 33532 m², held by virtue of Deed of Transfer 3779/1947;

3.8 The Remaining Extent of Portion 43 (a subdivision of Portion 41) of the farm Kraans Kloof 867, now the Remaining Extent of Portion 43 (of Portion 41) of the farm Kraans Kloof 867, in extent 12141 m² held by virtue of Deed of Transfer no. 5620/1942;

3.9 Lot 442, Queensburgh Township, situate in the Borough of Queensburgh, County of Durban, province Natal, in extent 3 acres (1.2141 ha) held by Deed of Transfer no. 6787/1955

4.

The late Runga Nattan and the plaintiff had rights in land, as defined in the Restitution Act, in respect of the aforementioned properties.

5.

The plaintiff and the said Runga Nattan were dispossessed, as contemplated in the Restitution Act, of these rights in land in respect of the said properties as a result of past racially discriminatory laws and practices during the period 1963 to 1982.

6.

The plaintiff is a direct descendant of the late Runga Nattan, who died without lodging a claim in terms of the Restitution Act.

7.

On or about 20 March 1997, the plaintiff duly lodged land claims on the prescribed land claim forms with the Commission claiming restitution of the rights in land referred to above.

8.

8.1 The plaintiff's said claims comply in all respects with the requirements for valid restitution claims in terms of section 2(1) of the Restitution Act and the validity of his claims were admitted by the defendant.

8.2 As such, the plaintiff is entitled to restitution of the rights in land dispossessed from the plaintiff and the plaintiff's father in respect of the said properties.

8.3 The plaintiff opted for restitution of these rights in land by way of equitable redress in the form of payment of compensation.

8.4 The plaintiff's right to restitution is a right recognised in the Constitution of the Republic of South Africa, read with the Restitution Act, which gives effect to the plaintiff's constitutional right.

8.5 The plaintiff was at all material times entitled to compensation calculated on the difference between such amount that would have constituted just and equitable compensation as contemplated in section 25(3) of the Constitution or any other consideration which is just and equitable calculated at the time of the dispossession of the said rights, and the amounts actually received by the plaintiff and the plaintiff's late father at the time of dispossession. The difference between the compensation received and the compensation that should have been received at the time of dispossession, has to be adjusted to present day value to take account of the changes over time in the value of money.

8.6 The first defendant and its officials had at all relevant times a statutory duty to take reasonable steps to ensure the plaintiff is assisted in the preparation and submission of his claims, to advise him on the progress of the claims at regular intervals, to investigate the merits of the claims and to mediate and settle disputes arising from the claims. The first defendant and his officials also had at all relevant times the statutory duty to ensure that the plaintiff's claims are settled in a just and equitable manner in accordance with the principles set out above and to make recommendations to the second defendant in this regard and to advise the plaintiff accordingly.

8.7 The Commission and its officials had a statutory duty to deal with the plaintiff's claims in accordance with the law, with reference to the Constitution and the Restitution Act. In particular, the Commission and its officials are not entitled to determine the compensation payable to the plaintiff as equitable redress in an arbitrary manner which would result in the plaintiff again receiving compensation that is not just and equitable.

9.

During or about October 2002 duly authorised representatives of the first defendant made the following misrepresentations to the plaintiff;

9.1 The plaintiff was informed that the maximum amount to which he was entitled in respect of his claims for the dispossession of each of the rights in land pertaining to the properties set out above, was an amount of R 50 000,00 per property.

9.2 One Ranjive Nirghan, an official of the first defendant, informed the plaintiff that all claimants are entitled to R 50 000.00 per property only, that there is no basis on which more than R 50 000.00 for the dispossessed rights in respect of each property can be paid to the plaintiff and that the second defendant has approved a so-called section 42D framework agreement on the basis that claims be settled by payment of R 50 000.00 per property.

9.3 The plaintiff was further informed that the amount of R 50 000.00 per property was based on a proper calculation of the value of each claim and that the calculation was done according to the methodology reflected in the section 42D framework memorandum agreement approved by the second defendant.

10.

As a result of the representations referred to above, the plaintiff and the Department of Land Affairs, represented by Ms Thabatha Agatha Shange duly authorised by the Director General of the said Department entered into a settlement agreement, of which a copy is annexed hereto marked annexure "A". The plaintiff prays that the terms thereof be incorporated herein as if specifically so pleaded.

11.

The following were relevant terms of the settlement agreement:

11.1 The parties acknowledged that the plaintiff was entitled to restitution of rights in land in respect of the properties referred to above, as well as in his capacity as representative of the entity which lost rights in lands in respect of a property known as Sub 466 (of 454) of the farm Buffels Bosch 965.

11.2 The State accepted that the compensation received at the time of dispossession was not just and equitable.

11.3 The parties recorded that the plaintiff has opted to claim monetary compensation in respect of the dispossession of the rights in land.

11.4 The State shall pay the plaintiff an amount of R 500 000.00 to the plaintiff which is the total monetary value of the various claims (i.e R 50 000.00 per property) of which an amount of R 450 000.00 represented compensation in respect of the properties listed in paragraph 3 above.

11.5 The parties recorded that the plaintiff accepted the methodology reflected in the section 42D framework memorandum agreement approved by the Minister (the second defendant) as the agreed basis for calculating the monetary value of the claim.

11.6 The parties recorded that the payment of the sum of R 500 000.00 shall be in full and final settlement of the plaintiff's restitution claims and shall represent a complete discharge of the State's obligation to make payment to the plaintiff.

12.

12.1 The State duly paid an amount of R 450 000.00 to the plaintiff in respect of the settlement of the claims referred to in paragraph 11 above in respect of the properties listed in paragraph 3 above.

12.2 Despite the wording in clause 3.7 of the agreement, annexure "A" hereto, the plaintiff was never provided with a copy of the section 42D framework memorandum agreement approved by the Minister and was refused access to such document until November 2009.

12.3 On 20 February 2007 the plaintiff received a letter from the first defendant's regional office in KwaZulu-Natal. A copy of this letter is annexed hereto marked annexure "B". The following appears from this said letter:

"1. Obtaining additional compensation:

The Land Claims Commission: KZN was initially authorised to settle urban claims in the Durban Metro area for the sum of R 50 000.00 per property. Many claimants accepted this offer of R 50 000.00 and their claims were settled in full and final settlement. However, during the course of our research, it became apparent that many of the claims that were not settled, consisted of properties that were very large. The R 50 000.00 did not take the size of the property into consideration. To address this issue, it was proposed that the restitution award should take land size into account.

2. The New Mandate for Buffelsbosch

The New Mandate to settle the Buffelsbosch claims has now been approved by the Chief Land Claims Commissioner. We have restructured the method of compensating Claimants. Claimants are now compensated in accordance with the size of the claimed properties. The new mandate now offers a minimum award of R 50 000.00 for property sizes up to 1200 m². All claimed properties over 1200m² will be awarded proportionally more compensation, according to the size of the properties."

12.4 A copy of the section 42D framework memorandum agreement, being a request for Ministerial approval in terms of section 42D of the Restitution of Land Rights Act, 1994, prepared by the Regional Land Claims Commissioner, KwaZulu-Natal and approved by the Chief Land Claims Commissioner, the Chief Financial Officer, the Director General of the Department and the then Minister of Land Affairs, Minister AT Didiza on 3 June 2002, is annexed hereto marked annexure "C".

13.

The following appears from annexures **"B"** and **"C"** hereto:

13.1 The first defendant recommended to the second defendant that a standard settlement offer of R 50 000.00 per property be awarded to each claimant and recommended that the Minister approves such standard settlement offer.

13.2 It further represented to the Minister that the standard settlement offer was calculated using the recommendation put forward in a "Report to the Commission on Restitution of Land Rights on Historical Valuation Reseach, Cato Manor, Durban (1997)", hereinafter referred to as "the Report".

13.3 In the letter to the plaintiff, annexure "B" hereto, the first defendant acknowledged that the amount of R 50 000.00 per property did not take the size of t the property into consideration

and that the restitution award should have taken the land size into account. The letter further acknowledged that any unsettled claims would be settled on the basis of a minimum award of R 50 000.00 for properties up to 1 200m² and that the compensation of all properties larger than 1 200m² shall be calculated proportionally according to the size of the property.

14.

During or about November 2009 the first defendant made the Report which is referred to in the section 42 memorandums to the Minister, and on which the offer to the plaintiff was allegedly based, available to the plaintiff. This document is too bulky to annex to these papers, but will be properly discovered. The document is a well researched historical valuation of properties in Cato Manor and made well motivated recommendations as to the manner in which the value of restitution claims should be calculated, taking into account the value of the property dispossessed, the compensation paid at the time of dispossession and an adjustment of the nett shortfall in compensation received at the time of dispossession.

15.

As a result of the aforegoing, it transpired that the representations made by the first defendant's officials at the time when the first defendant negotiated a settlement of the plaintiff's land claims with him, were false, *inter alia* in the following respects:

15.1 The amount of R 50 000.00 per property did not represent the true value of each of the plaintiff's claims;

15.2 The amount of R 50 000.00 per property did not take the size or value of the property dispossessed into account;

15.3 The amount of R 50 000.00 per property in actual fact reflected the value of a claim in respect of a property not exceeding 1 200m² in extent;

15.4 The amount of R 50 000.00 per property in respect of the properties referred to in the plaintiff's claims, which were all larger than 1 200m² in extent, was not calculated in accordance with the approved calculations referred to in the Cato Manor Report.

15.5 The calculation of the monetary value of the plaintiff's claims were not in accordance with the methodology reflected in the section 42D framework memorandum agreement approved by the Minister.

15.6 Plaintiff was entitled to claim compensation in excess of R 50 000.00 per property and was not obliged to accept the arbitrary figure arrived at by the first defendant.

16.

16.1 The misrepresentations made by the representatives of the first defendant, who also acted as agents for the second defendant, were not only false, but were material and would have influenced a reasonable man to enter into such contract, were intended to induce the plaintiff to enter into the settlement agreement and in fact induced the settlement agreement.

16.2 Had the plaintiff known at the time of entering into the agreement that these representations were false and that he was in fact entitled to just and equitable compensation equal to the adjusted value of the shortfall between the compensation received at the time of dispossession and the amount that should have been paid at the time of dispossession, the plaintiff would not have entered into the settlement agreement.

16.3 In the premises, the plaintiff is entitled to a cancelation of the settlement agreement and to the further relief set out below.

17.

In addition to the aforegoing, or in the alternative to paragraphs 16 and 17 above, the plaintiff is entitled to a declaratory order that the settlement agreement between the plaintiff and the defendants is invalid and void *ab initio* in that:

18.1 It is in breach of the plaintiff's constitutional right to restitution;

18.2 Against public policy;

18.3 That the agreed compensation was based on an arbitrary figure and did not constitute fair and equitable compensation and was therefore in breach of both the Constitution and the Restitution of Land Rights Act.

CLAIM 2:

19.

The plaintiff is entitled to just and equitable compensation as a result of the dispossession of the rights in land in respect of the properties referred to in paragraph 3 above.

20.

The value of plaintiff's claims, calculated in accordance with the approved methodology that should have been employed in the settlement agreement, annexure "A" hereto, is the following:

20.1 In respect of Erf 2823, Pinetown – 23580m² divided by 1 200m² = 16,65m² X R 50 000.00	R 982 500.00
20.2 In respect of Erf 2822, Pinetown – 19537m² divided by 1 200m² = 16,28m² X R 50 000.00	R 814 000.00
20.3 In respect of Erf 2408, Pinetown – 1619m² divided by 1 200m² = 1,35m² X R 50 000.00	R 67 458.00
20.4 In respect of Sub 9 of Lot M – 1579m² divided by 1 200m² = 1,31m² X R 50 000.00	R 65 791.00
20.5 In respect of Lot 442, Queensburg Township – 12141m ² divided by 1 200m² = 10,11m² X R 50 000.00	R 50 587.00
20.6 In respect of Sub 3 of Lot F, Buffels Bosch 965 – 148605m² divided by 1 200m² = 123.83m² X R 50 000.00	R 6 191 875.00
20.7 In respect of Sub 411, Buffels Bosch - 1303m² divided by 1 200m² = 1,09m² X R 50 000.00	R 54 291.67
20.8 In respect of Sub 5 (a subdivision of Sub 43 of the farm Kraans Kloof 867 – 33532m² divided by 1 200m² = 24,79m² X R 50 000.00	R 1 389 666.00
20.9 In respect of the Remaining Extent of Portion 43 of the farm Kraans Kloof – 12141m² divided by 1 200m² = 10,01m² X R 50 000.00	R 505 875.00
SUBTOTAL	**R 10 577 331.00**
Less amount paid in respect of these properties	R 450 000.00
TOTAL	**R 10 127 331.00**

21.

In the alternative to paragraph 20 above, the plaintiff is entitled to a determination by the Honourable Court of the compensation payable to the plaintiff as equitable redress, which the plaintiff pleads is an amount of not less than R 10 577 331.00.

20.1 In respect of Erf 2823, Pinetown – 2358m² divided by 1 200m² = 19,65 X R 50 000.00	R 982 500.00
20.2 In respect of Erf 2822 Pinetown – 19537m² divided By 1 200m² = 16,25 X R 50 000.00	R 814 000.00
20.3 In respect of Erf 2408, Pinetown – 1619m² divided By 1 200m² = 1,35 X R 50 000.00	R 67 458.00
20.4 In respect of Sub 9 of Lot M – 1579m² divided by 1 200m² = 1,31 X R 50 000.00	R 65 791.00
20.5 In respect of Lot 442, Queensburg township 12141m² divided by 1 200m² = 10,11 X R 50 000.00	R 505 875.00
20.6 In respect of Sub 3 of Lot F, Buffels Bosch 965 – 148605m² divided by 1 200m² = 123,83 X R 50 000.00	R 6 191 875.00
20.7 In respect of Sub 411, Buffels Bosch – 1,2754 ha or 12 754m² divided by 1 200m² = 10,63 X R 50 000.00	R 531 417.00
20.8 In respect of Sub 50 a subdivision of Sub 43 of the Form Kraans Kloof 867 – 33532m² divided by 1 200m² = 24,79 X R 50 000.00	R 1 389 666.00
20.9 In respect of the Remaining Extent of Portion 43 of The farm Kraans Kloof – 12141 divided by 1 200m² = 10,01 X R 50 000.00	R 505 875.00
SUBTOTAL	**R 11 054 457.00**
Less amount paid in respect of these properties	R 450 000.00
TOTAL	**R 10 604 457.00**

21.

WHEREFORE the plaintiff claims, tendering repayment of the amount of R 450 000.00 received by plaintiff in respect of the properties referred to in paragraph 3 above.

1. An order setting aside the memorandum of agreement entered into between the Department of Land Affairs and the plaintiff of 29 October 2002, alternatively an order declaring the memorandum of agreement invalid and null and void;

2. An order that the second defendant pays to the plaintiff the amount of R 11 054 457.00 as compensation plus interest on this amount at the prescribed rate of R 15,5% per annum a *tempore morae*;

3. Alternatively to prayer 2 above, an order in terms of which equitable redress in the form of compensation for the dispossession of rights in land in respect of the properties referred to in paragraph 3 of the statement of claim, be determined by the Honourable Court in an amount of not less than R 11 054 457.00;

4. That the second defendant be ordered to pay the amount so determined to the plaintiff, plus interest at the prescribed rate of 15,5% per annum a *tempore morae;*

5. Costs of suit;

6. Alternative relief."

Background

[2] On the 20 March 1997 the plaintiff lodged claims in terms of the Restitution of Land Rights Act 22 of 1994 (the Act). The claims were found to be valid and plaintiff was compensated. The claims were settled and a section 42 D agreement was entered into on the 29th November 2002. Plaintiff accepted an amount of R50, 000.00 per property. Plaintiff was consequently paid an amount of R500, 000.00 (five hundred thousand rand).

[3] On the 20th February 2007 plaintiff received a letter from the first defendant's regional office in Kwa Zulu Natal. The letter reads as follows:

"1. **Obtaining additional compensation**

The Land Claims Commission; KZN was initially authorised to settle urban claims in the Durban Metro area for the sum of R50 000.00 per property and their claims were settled in full and final settlement. However, during the course of our research , it became apparent that many of the claims that were not settled consisted of properties that were very large. The R50 000, 00 did not take the size of the property into consideration. To address the issue, it was proposed that the restitution award take land size into account.

2. **The new mandate**

The New Mandate to settle Buffelsbosch claims has now been approved by the Chief Land Claims Commissioner. We have restructured the method of compensating Claimants. Claimants are now compensated in accordance with the size of the claimed properties. The new mandate now offers a minimum award of R50 000, 00 for property sizes up to R1200 square metres. All claimed properties over 1200 square metres will be awarded proportionally more compensation, according to the size of the properties"

Issues to be determined:

[4] Whether there was any form of misrepresentation on the part of the defendants rendering the section 42 D agreement void or voidable.

[5] The defendants raised three special pleas to the Statement of Claim. These are Prescription, Arbitration and lack of cause of Action. However, the parties agreed that the plaintiff should commence first and that the special pleas be dealt with at the end of evidence on the merits. I now deal with the special pleas only of Prescription, and lack of Cause of Action. The special plea of Arbitration was not pursued as it had been overtaken by events.

Prescription:

[6] This special plea is premised on the provisions of section 11(d) of the Prescription Act 68 of 1969.[1] Defendants submit that the debt became due on 28th November 2002 being the date when the claim was being settled. Counsel for the defendants submits that the three year period expired on or about the 28th November 2005. That plaintiff's current action was only launched on the 03 October 2007.

[7] It is trite that for prescription to run against the creditor, the creditor should have had knowledge of the existence of the debt.[2]

[1] Section 11(d) of the Prescription Act reads: " save where an Act of Parliament provides otherwise, three years in respect of any other debt".

[2] Section 12(3) of the Prescription Act reads: "A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.(my underlining). *Truter & Another v Deyser* 2006 [4] S A 168 (SCA) paragraph 16 *Minister of Finance & Others v Gore N.O.* 2007 [1] S A III (SCA) at paragraph 17

[8] On the 20th February 2007 plaintiff received a letter from the offices of the Land Claims Commission KwaZulu Natal. As per paragraph [3] *supra*

[9] Upon receipt of the letter *supra* plaintiff instituted action on the 3rd October 2007 eight months from acquisition of knowledge. It is on this date, the 20 February 2007 that the debt became due. This special plea stands to be dismissed.

Statement of claim does not disclose a cause action.

[10] It would seem that defendants base their special plea on the fact that there is no claim currently before this court.[3]

[11] Further that the agreement entered into by the plaintiff and defendants is binding. That the settlement thereof was in 'full and final settlement". That the terms of the agreement have been implemented and therefore discharged. The submission is that the court may not interfere with a written contract already complied with save if the terms thereof were against public policy.[4]

[12] It is trite that cause of action means every fact which would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.[5]

[13] In *Vermulen v Goose Valley Investment (Pty) Ltd*[6] Marais J A said the following:

> "It is trite that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that ex facie the allegations made by the plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law." (my underlining)

[14] It may be so that there is no claim before this court in that same was settled on 22 November 2002. However, what is of importance is as to whether based on the pleadings as they stand, is it impossible or difficult for the defendant to ascertain the claim he/she has to face. It is of importance that the defendant must be able to

[3] Defendant's Heads of Argument @paragraph 28, 29, 3, 29, 7, 36 & 37
[4] Defendant's Heads of Argument @ paragraph 31
[5] SALJ 1970@ 103 Abrahamse & Sons (Pty) Ltd v SAR& H 1933 (CPD) @626
[6] *Prins v Universiteit van Pretoria* 1980 [2] S A 171 [T] 174 @G

ascertain what is being sought if this is possible then the cause of action will be found to be existing.

[15] The letter dated 20 February 2007 cannot be regarded to be the cause of action. The cause of action arose when plaintiff, by reading the said letter realised that he does have a claim. The facts to be proven are concise and clear to embody a cause of action.

[16] Harms- Civil Procedure in the Supreme Court states:

> "If evidence can be led which can disclose a cause of action on defence alleged in a pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on a pleading can disclose a cause of action or defence."

[17] In *casu*, I cannot find any obscurity in the pleading. This exception stands to be dismissed as well.

As a result of the letter dated 20 February 2007 *supra* plaintiff dispatched a letter dated 15 May 2007 to the first respondent. It reads thus:

Letter to the office of the Commission on Restitution of Land Rights in KwaZulu Natal dated 15 May 2007.

> "I refer to your letter dated 20th February 2007 in which it appears that inadvertently certain claimants were underpaid in error and that the amount of compensation should have been calculated on the basis of R 50 000-00 per 1200 square meters of land that was lost.
>
> Apart from Sub 466 (of 454) of the farm Buffelsbosch, I was deprived of ownership of the following properties, each in extent as stated: -
>
> 1. ERF 2823 Pinetown in extent 23580 sqm
> 2. REM OF ERF 2822 Pinetown in extent 19537 sqm
> 3. ERF 2408 Pinetown 1619 sqm
> 4. SUB 9 of Lot M of Lot 1 OF 1550 Durban is now ERF 1550 Durban North 1579.3 sqm
> 5. Lot 442 Queensburgh Township is now ERF 442 Queensburgh in extent 12141 sqm
> 6. SUB 3 OF Lot of Buffelsbosch No 965 is now remaining extent of Portion 3 of the farm Buffelsbosch No. 965 in extent 148605 sqm
> 7. SUB 411 of 1 of F of the farm Buffelsbosch No. 965 is now Portion 411 of 121 of the farm Buffelsbosch No. 965 in extent 1303 sqm
> 8. SUB 5 (a subdivision of SUB 43) of the farm Kraans Kloof No 867 is now Portion 50 (of Portion 43) of the Farm Kraans Kloof No. 867 in extents 33532 sqm
> 9. Rem Extent of Portion 43 (a subdivision of Portion 41) of the farm Kraanskloof No 867 is now Rem Ext of Portion 43 (of Portion 41) of the farm Kraanskloof No. 867 in extent 12141 sqm
>
> As is on record, I made my claims just over ten years ago and because numerous enquiries elicited no response, and there were frequent reports in the press that the work of your sector was due to come to end, I was completely frustrated and was at

my wits end.

Thus when I accepted the compensation offered of R 50 000.00 per property and I was informed that that was the only amount and no greater sum would be offered, I had no choice, even though I was most unhappy, but under duress to acquiesce. Therefore there was no full agreement by me to accept the amount less than that which I should have been paid. Accordingly there was no proper or just "full and final settlement".

I respectfully submit that I should be paid on the basis set out in your said letter namely at R 50 000.00 per 1200 square metres or proportionately in respect thereof and shall be glad to receive your confirmation thereto. If not, then great injustice will be done to me, which is, I submit not the intention of the legislation. The purported "in full and final settlement" was not in accordance with justice or the concept of justice envisaged in the relevant legislation and the purported full and final settlement was void in this case.

The amount due and payable to me in respect of the abovementioned properties is R 10 314 022.00 calculated as follows: -

1. ERF 2823 Pinetown

23 580
1200 = 19.65 X 50 000 = 982 500
Less paid 50 000
Due 932 500

2. ERF 2822 Pinetown

19 537
1200 = 16.28 X 50000 = 814 000
Less paid 50 000
Due 764 000

3. ERF 2408 Pinetown

1619
1200 = 1.35 X 50 000 = 67 458
Less paid 50 000
Due 17 458

4. SUB 9 M

1579
1200 = 1.31 X 50 000 = 65 791
Less paid 50 000
Due 15 791

5. LOT 442 QUEENSBURG

12 141
1200 = 10.11 X 50 000 = 505 875
Less paid 50 000
Due 455 875

6. LOT 3 OF F BUFFELSBOSCH

148 605
1200 = 123.83 X 50 000 = 6 191 875
Less paid 50 000
Due 6 141 875

7. SUB 411 BUFFELSBOSCH

1303 sqm not applicable

8. SUB 5 (OF 43)

33 532
1200 = 24.79 X 50 000 = 1 389 666
Less paid 50 000
Due 1 339 666

9. REM OF PORTION 43 KRAANSKLOOF

12 141
1200 = 10.1 X 50 000 = 505 875
Less paid 50 000
Due 455 875

SUMMARY OF AMOUNTS DUE AND PAYABLE

1. 932 500
2. 764 000
3. 17 458
4. 157 791
5. 505 875
6. 6 141 875
7. -
8. 1 339 666
9. 455 875

Total Due = R 10 314 022.00

I hereby lodge my claim for payment of the sum of R 10 314 022.00 by which sum I was underpaid by my being given wrong information or by error. As I have waited over ten years for payment of the compensation to which I was entitled, I request that you give this matter your most urgent attention and to make payment within 30 days. The news reports that your department may close down is yet another reason for the greatest urgency.

In the event that you do not agree with our computation of our client's claim, then we suggest that it be referred to arbitration."

[18] The first defendant's response is embodied in the letter dated 18th July 2007. It reads thus:

Letter from the office of the Commission on Restitution of Land Rights in KwaZulu Natal dated 18 July 2007

"We refer to your letter dated 15 May 2007, the contents of which have been noted.

As per our subsequent telephonic conversation on Tuesday, 17 July 2007, I have requested the relevant claim files for the various properties in terms of which the settlement agreements have already been signed.

Once I have received these files, a meeting will be set up with you to discuss the various issues that you have raised in your letter.

> We wish to advise you, however, that in terms of the acceptance clause of settlement agreement that you signed, the acceptance of the restitution award in ***full and final settlement*** of your restitution claim."

On the 27 September 2007 the Plaintiff launched the Notice of Action.

Misrepresentations:

[19] Plaintiff's thrust is on the alleged misrepresentation. Respondents contend that there is no misrepresentation made in any form. In addition plaintiff argues that compensation awarded to plaintiff is not in accordance with plaintiff's constitutional right to restitution and therefore not just and equitable.

[20] It is important to determine the presence or otherwise of the alleged misrepresentation. It is trite that the party seeking to avoid a contract must prove the element of misrepresentation.[7] The accepted elements are:

a) who makes the representation

b) that a representation was made

c) that it was a representation as to a fact.

d) that the representation was false.

e) that the misrepresentation was material

f) that it was made with intent and

g) that the misrepresentation induced the contract.

I now deal with each of these elements.

Who makes the representation?

[21] This is a fairly straightforward element when two parties are contracting and one of them makes a misrepresentation. The only difficulty that arises is when an independent third

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party is responsible for the misrepresentation; the general rule applicable is stated in *Karabus Motors (Pty) Ltd v Van Eck*[8] where Watermeyer J held:

> "It is a general rule of our law that if the fraud which induces a contract does not proceed from one of the parties, but from an independent third person, it will have no effect upon the contract. The fraud must be the fraud of one of the parties or of a third party acting in collusion with, or as the agent of, one of the parties".

The defendant tendered evidence of two witnesses R R Nirghin and K Rambali, defendant representatives/agents to first defendant in their capacities as the then coordinator in the Urban Unit Settlement of urban claims and project manager overseeing settlement of claims respectively.

It is not in dispute that the two above mentioned witnesses are representatives / agents of the first respondent.

[22] That representation was made and was as to a fact:

It is plaintiff case that an officer of first defendant one Raimijui Rasmal Nirghin represented to plaintiff that R50 000.00 is per every claim. That there was no basis upon which more than R50 000.00 can be paid. That a section 42D framework agreement was approved by second defendant to that effect.

[23] Plaintiff's evidence is to the effect that Mr Nirghin told him, plaintiff that if he plaintiff, does not accept the R50 000.00 compensation he, plaintiff will end up getting nothing. This is disputed. However, Mr Nirghin testified that he told plaintiff about the other options plaintiff had, ***interalia*** alternative land, settlement using other methodology and approaching the court.

[24] It turned out under cross- examination that the only option mentioned to plaintiff was the court option.

[25] It is startling that Mr Nirghin evidence is that he went through the agreement with the plaintiff. This cannot be true given answers under cross examination. Clearly the provisions of 3.1 to the agreement were not explained to the plaintiff. Paragraph 3.1 at page 70 herein provides:

[8] 1962 1 SA 451 (C)

" The Claimant hereby accepts the restitution award as set out herein, above the other options provided for in the Act, (my underlining) in full and final settlement of the CLAIMANT'S claim for the restitution of land rights, terms of the Act, registered under claim reference numbers :

KRN 6/2/3/E/8/817/1925/229

KRN 6/2/3/E//8/817/1165/1

KRN 6/2/3/E/8/817/2717/139

KRN 6/2/3/E/8/817/3164/1

KRN 6/2/3/E/8/817/1863/3

KRN 6/2/3/E/8/817/1863/61

KRN 6/2/3/E/8/817/1863/69

KRN 6/2/3/E/8/817/2714/38

KRN 6/2/3/E/8/817/2714/39

The STATE shall pay the claimant, alternatively the duly authorised representative: PATHMANATHAN RUNGANATHAN NAIDOO, Identity Number 350521 5045 08 4, the amount of FIVE HUNDRED THOUSAND RANDS ONLY (R500 000 00) which is the total monetary value for the claim herein."

[26] Without the explanations "of the other options" it is difficult not to accept that the plaintiff believed that the only route or option he had was to accept the compensation tendered.

[27] Counsel for the defendants argued that the plaintiff could have utilised his option and approach the courts. I need not overemphasise the fact that the courts involved money. Given the fact that the plaintiff only had legal assistance at the lodgement of the claims the court issue may have seemed undoable hence the acceptance of the offer. There is no evidence that plaintiff, at the time of lodging the claim was a person of means.

[28] Mr Nirghin told plaintiff that according to the mandate the amount of R50 000.00 per claim is the only amount payable and nothing else. This could not have been true. The settlement agreement between plaintiff and second respondent dated 02 October 2006 provides for the amounts in excess of R50 000 00 per property.

[29] Paragraph 3.2 of the said agreement sets out a table of calculations.

[30] It is not disputed that the size of the property sub 9 Lot M of Lot 1 No 1550 is more than 1200 square metres.

[31] Counsel for the defendants hold the view that the plaintiff should have seen this discrepancy and not sign the agreement. Indeed, plaintiff is an astute retired businessman. However, he explained that he thought that the table referred to the R50 000 00 under discussion. However, defendants pleaded that the award of compensation was on a sliding scale and it took the size of the property into account.[9]

[31] The plaintiff entered into a settlement agreement with the second defendant on the 22 November 2002. One of the recordals at paragraph 3.7 provides that plaintiff accepts a methodology approved by second defendant in section 42D framework. It reads:

> 'The claimant accepts the methodology reflected in the section 42D framework memorandum agreement approved by the Minister as the agreed basis for calculating the monetary value of this claim."

[32] It is the evidence of the defendant that the said section 42D framework memorandum was not given or shown to the plaintiff at the time of entering into settlement agreement. The said memorandum was subsequently provided to the plaintiff almost a year later upon request. Scrutiny of this memorandum approved by the Minister on 03 June 2002 provides for settlement options [10] in the form of financial compensation and restoration of land. It provides for non acceptance of the SSO by a claimant.[11]

> "Claimants who do not accept this offer need to be settled in terms of another methodology that will be motivated in another memorandum. However, priority will be afforded to those whose claims have been validated and those that choose the SSO."

[9] Plea @ page 57 paragraph 1.3.2
[10] Section 42 D memorandum paragraph [6]
[11] Paragraph 4.1.7

[33] It is clear that this information was not brought to the attention of the plaintiff at the time of signing the settlement agreement. This amounts to non disclosure on the part of the defendants.

[34] It is law that misrepresentation need not only be made expressly, silence may also amount to misrepresentation.[12]

[35] There is no general duty in our law that all material facts must be disclosed, however, in some circumstances this is the rule. In *Mc Cann v Goodall Group Operations (Pty) Ltd*[13]the full bench held:

> "… the following principle emerge.
>
> (c) a negligent misrepresentation by way of an omission may occur in the form of a non disclosure where there is a legal duty on the defendant to disclose some or other material fact to the plaintiff and he fails to do so
>
> (d) silence or inaction as such cannot constitute a misrepresentation of any kind unless there is a duty to speak or act as aforesaid. Examples of a duty of this nature includes the following:
>
> (i) a duty to disclose a material fact arises when the fact in question falls within the exclusive knowledge of the defendant and the plaintiff relies on the frank disclosure thereof in accordance with the legal convictions of the community"

[36] I conclude that in instance where a public official is aiding a member of the community in circumstances where they hold exclusive knowledge of the applicable process, such official does have a duty to disclose such information. There was a duty on Nirghin to disclose all information to plaintiff to enable plaintiff to make an informed decision[14]

[37] I find innocent misrepresentation herein. Defendants did not misrepresent to the plaintiff with any particular intent to induce him to enter into the settlement agreement.

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[12] Christie R H Law of Contract of South Africa 5th Edition 276
[13] 1995 [2] S A 718 (C)
[14] *Absa Bank Ltd v Fouche* 2003[1] SA 176 (SCA) 181 J – 181 A-C

Misrepresentation must be material

[38] In order to succeed on recession misrepresentation must be material. The question of materiality is one of fact decided on a case by case as evidenced in the dicta in *Pathescope (Union) of S A Ltd v Mallinick*[15] Conradie states:

> "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 a contract."

In this matter with particular reference to the evidence of plaintiff and Nirghin I conclude that the misrepresentation is material. The disclosure of information by Nirghin to the plaintiff at the time of entering into the agreement would have yielded different results.

Misrepresentation induced the contract

[39] Plaintiff has to prove not only the presence of misrepresentation but also that the said misrepresentation induced him or her to enter into a contract. Put otherwise, the misrepresentation must have caused the plaintiff to enter into a contract where he would not have contracted at all, or conclude a contract on terms he otherwise would not have consented.[16]

[40] Mr Nirghin represented to the plaintiff that the amount R50 000.00 per claim will not be increased, that the settlement amount is the only one approved by the second defendant and that the calculation was on a sliding scale.

[41] In my opinion, plaintiff being dependant on first defendant for guidance in calculating and submitting the claim had no alternative but to conclude the contract. The option given to the plaintiff to approach the court, did not seem enticing.

[42] I conclude that plaintiff would not have contracted as he did but for misrepresentation.

[43] Defendant submitted that this contract was in full and final settlement basis and binds the plaintiff. Our law provides that acceptance of an offer in full and final

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[15] 1927 A D 292 @ 307
[16] Footnote 14 *supra* @ page 181 @ paragraph [6]

settlement does not preclude a challenge of the settlement where the acceptance is based on misrepresentation[17].

[44] I have already made a finding that there was misrepresentation in this case and I consequently make the following order:

Order

1. The memorandum of agreement entered into on the 22nd November 2002 is hereby set aside.
2. The first and or second respondent to pay the costs

_____

ACTING JUDGE M J MPSHE

For the Plaintiff
Adv H Havenga SC for the Applicant *instructed* by *Hassan, Parsee & Poovalingam Attorneys,* Durban

For the First & Second Defendant
Adv T Norman S C for *the* 1st and 2nd Respondent instructed by the State Attorney, *Durban*

[17] Van der Merwe et al : Contract : General Principles 3 Edition @ 115