IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No. 1937/2007

In the matter between:

CLASS A TRADING 689 (PTY) LTD Plaintiff

and

LEONARD MARTIN PATON Defendant

and

HANS JACOB GILDENHUYS Third Party

JUDGMENT

ROGERS AJ

Introduction

1. On 8 April 2006 the plaintiff ("CAT") concluded an agreement of sale with the defendant ("Paton") in terms whereof CAT bought from Paton for R1.7 million a piece of vacant land in Mossel Bay described as Remainder Erf 790 Tergniet ("Erf 790" or "the property"). CAT, represented at the trial by Mr Steenkamp, claims R425 000 from Paton on the basis of the alleged breach of a term, alternatively a misrepresentation, relating to the extent of the property and its suitability for development. Paton, represented at the trial by Mr Badenhorst, opposes the claim. Paton joined as a third party one Gildenhuys, a land

surveyor, on the basis that if Paton was held liable to CAT, Paton had a claim in a like amount against Gildenhuys because of the latter's alleged negligent performance of work Paton engaged him to do prior to the sale. However, during the course of the trial Mr Badenhorst informed me that Paton was withdrawing his claim against Gildenhuys whereupon Mr De Bruyn, who represented Gildenhuys, was excused.

2. It is now common cause that Erf 790 is 6 311m^2 in extent, inclusive of Impala Road which runs across the northern part of the property. Impala Road is a tarred municipal road. Inclusive of a road reserve of 10 metres on each side measured from its centre line, Impala Road occupies 2 550m^2 of the property. (All references hereafter to Impala Road include the full road reserve.) Of the balance of 3 761m^2, 2 989m^2 lies to the south of Impala Road and 772m^2 to the north. The precise position regarding the formal ownership of the land on which Impala Road is situated is not altogether clear but the parties were agreed that for practical purposes it had not belonged to Paton and was not part of the land sold to CAT.

3. At the time of the sale, however, the parties were under a misapprehension as to the extent and layout of the property. There was annexed to the deed of sale as annexure "A" a sketch plan, prepared by Gildenhuys in late January 2006, which reflected that the full extent of Erf 790 was 6 030m^2, that the road reserve tracked the northern boundary of the property (i.e. that the northern boundary of the road reserve coincided with the northern boundary of the property) and that the area south of the road reserve was 3 464m^2.

4. Although the said sketch plan reflected the full extent of the property as being 6 030m^2, the parties were aware at the time of concluding their contract that the title deed stated the area of the property to be 7 371 m^2.

5. Clause 18 of the deed of sale provided as follows under the heading *"Special Conditions"*:

> *'18.1 The PURCHASER hereby acknowledges that he is aware of the fact that the actual size of the PROPERTY is less than the surface area of 7 371m^2 as stated by the Municipality of Mossel Bay and the SELLER's Title Deed. This awareness is as such reflected in the purchase price which would have been greater if the actual size of the PROPERTY was in fact 7 371m^2. The purchaser furthermore acknowledges that he is aware of the fact that the actual size of the PROPERTY is 3 464m^2 as is indicated by the Surveyor's Sketch Plan, marked 'A', attached hereto and dated 27/01/06.*
>
> *18.2 It is furthermore hereby recorded that the area in which the PROPERTY is located has been earmarked by the Municipality of Mossel Bay for residential establishment, but that the PURCHASER will have to embark on the necessary application process in order to obtain the required approvals for a cluster housing development similar to the attached draft plan, marked 'B', if the PURCHASER should wish to develop the PROPERTY as such.'*

6. I have already referred to the sketch plan attached as "A" to the sale agreement. The draft plan attached as "B" again reflected Impala Road as tracking the northern boundary of the property. The plan depicted, on the land south of the road, eight subdivided erven ranging in size from 306 m^2 to 460 m^2. Five of these subdivided erven were shown as bordering on the southern boundary of Impala Road while the other three were on the southern boundary of the property. The plan also depicted a cul-de-sac on the property which would provide access to the eight subdivided erven off a side road running down the western boundary of the property.

7. During the course of the trial CAT was granted leave to amend its particulars of claim so as to seek rectification of clause 18.1 by inserting the word *"developable"* between the words *"actual"* and *"size"* in the third sentence of that clause.

8. CAT's complaint in essence is that it bought the property on the basis that the area south of Impala Road was 3 464m^2 whereas it was only

2 989m^2. The property was bought for development purposes and this deficiency in area adversely affected the property's true value. While CAT's particulars of claim as amended are perhaps not a model of clarity, Mr Steenkamp submitted (without objection from Mr Badenhorst) that they covered three alternative causes of action, each of which would allegedly result in CAT being entitled to payment of R425 000, being the difference between what CAT paid for the property (R1.7 million) and the property's alleged actual value (R1.275 million). The three causes of action were:

(a) that clause 18.1 was a term that the property south of Impala Road would be 3 464m^2, for the breach of which CAT is entitled to claim damages;

(b) that clause 18 embodied *dicta et promissa* entitling CAT to claim a reduction in price on the basis of the Aedilitian remedies;

(c) that clause 18 together with representations made to CAT's representatives prior to the conclusion of the sale were wrongful and culpable misrepresentations for which CAT is entitled to claim delictual damages.

The factual matrix

9. I do not intend to relate the evidence in great detail. For the main it is uncontentious. Paton bought the property in 2003. He did so in the belief that the land he was acquiring was the land south of Impala Road.

10. In late 2005 or early 2006 he decided to put the property on the market though he was not under any pressure to sell. For this purpose he engaged an estate agency, Mosscape Coastal Properties in the person of its controller Mr Henri Mostert ("Mostert"). On 27 January 2006 a deed of sale was signed in terms whereof Paton sold the property to Hoofmark

Investments (Pty) Ltd ("Hoofmark") for R1.5 million. Clause 1 of the Hoofmark sale describe the property as Remainder Erf 790, 7 371m^2 in extent. However, clause 14.2 recorded Hoofmark's acknowledgment that the *"actual size"* of the property was less than 7 371m^2 and the parties' agreement that the actual size of the property was more likely to be between 3 400m^2 and 4 000m^2, and that the price of R1.5 million was based on this smaller extent. Clause 18.1 provided that the property would be surveyed within seven days of the signing of the agreement at an estimated cost of between R4 000 to R7 000, such cost to be shared by the parties equally. Clause 14.2 stipulated that if this survey revealed that the actual size of the property was less than 3 400m^2 Hoofmark would have the right to cancel the agreement.

11. Pursuant to these provisions Mostert arranged for Gildenhuys to determine the actual size of the property. Although clause 18.1 contemplated a survey, Gildenhuys did not carry out a survey. Instead he determined the size of the property by using data available from general plans of the area, an exercise for which he charged only R1 000. The product of this exercise was the sketch plan which later featured as annexure "A" to the agreement between CAT and Paton. Both Paton and Mostert knew that Gildenhuys had not done a survey and that his fee of R1 000 was below what he would have charged for a survey. It is apparent from the sketch plan itself that its dimensions are not based on a survey. The probabilities are that Paton and/or Mostert agreed that in order to save expense a full survey would not be done.

12. Gildenhuys' sketch plan reflected that the area south of Impala Road was 3 464m^2. Since this was (in the understanding of Paton and Hoofmark) the *"actual size"* of the property for purposes of clause 14.2, Hoofmark was not entitled on that basis to resile from the agreement. However, the conveyancers reported at about the same time that there was a land claim registered against the property. Since neither Paton nor Hoofmark

had been aware thereof, Paton agreed to allow Hoofmark to withdraw from the sale, and a consensual agreement of cancellation to that effect was concluded. (Paton subsequently established that the land claim had lapsed, and it did not feature in the case before me.)

13. Paton testified that he had been surprised at the ease with which the property had been sold to Hoofmark and he wondered whether his price had been too low. Following the consensual cancellation of the Hoofmark sale, he performed a more careful exercise to determine the value of the property, which resulted in his raising his asking price to R1.7 million. He told Mostert that he was not prepared to sell for less. (It should be mentioned here that after many years in municipal service Paton had qualified as a valuator in 2000 and has practised as such since then. However, no rule 36(9) notice was given in respect of his evidence. His evidence thus does not qualify as expert evidence adverse to CAT's case.)

14. During March 2006 Mr MH Mellet ("Mellet"), a director of CAT, contacted Mostert in connection with another property in Mossel Bay. Mostert then introduced Mellet to Erf 790. Mostert knew that CAT was looking for development opportunities. CAT was already engaged in another property project in Mossel Bay. With a view to marketing the property Mostert had prepared a plan showing a subdivision of the land south of Impala Road into eight erven. He testified that the plan was based on other developments of which he was aware in the broader Mossel Bay area and that in discussion with the municipality's chief town planner, Mr Kruger, the latter had indicated that in principle the municipality would not have an objection to such a development. This is the plan that later became annexure "B" to the sale agreement. Mostert showed this plan and Gildenhuys' sketch plan to Mellet. The land pointed out to Mellet as being the property for sale was the land south of Impala Road. He explained that the actual size of this land was 3 464m^2, even though the

title deed would record the size of the erf as being greater. Although the boundaries were not marked by pegs, Mostert pointed out the approximate position of the western and southern boundaries of the land (the northern/eastern boundary being marked by the road).

15. Mellet was attracted by the proposition. A few days later he arranged a further meeting on site with Mostert where Mellet's co-director Mr WJ Flemming ("Flemming"), an attorney, was present. This meeting was a substantial repeat of the previous one.

16. Mellet advised his co-directors that based on eight development opportunities (as reflected in Mostert's plan) a price of R1.7 million was acceptable. He informed Mostert that CAT would offer the full asking price but that the information about the actual size of the property should be included in the written agreement of sale. Mostert forwarded the proposed sale agreement to CAT. Flemming examined it and was satisfied. It was then executed, Mellet signing for CAT, Paton signing for himself and Mostert signing as estate agent.

17. Transfer into CAT's name was registered on 7 July 2006.

18. Mellet had engaged Mr Delarey Viljoen ("Viljoen") of Delplan, a firm of urban and regional planners, to assist in the proposed development of the property along the lines indicated in Mostert's plan. On 19 July 2006 Viljoen wrote to Mellet to advise that he had overlaid Gildenhuys' sketch plan on another plan containing contours and physical features, from which it appeared that Impala Road lay further south than indicated on Gildenhuys' plan. Viljoen had thus obtained a quote from Gildenhuys to determine the actual road area.

19. Gildenhuys thereupon performed an exercise in which he calculated that the area south of Impala Road, measured from a wire fence which appeared to mark the southern boundary of the road reserve, was 2

661m^2. On 26 July 2006 Viljoen advised Mellet of Gildenhuys' finding and said that this had considerable implications for the developable area of the property.

20. Flemming, in his capacity as attorney for CAT, wrote to the municipality's Mr Kruger, informing him that the actual location of Impala Road deviated from the road reserve reflected on the relevant general plan. He stated that the road's actual location had a negative impact on the developable area and on the value of the property. He asked the municipality to make suggestions for resolving the problem.

21. This approach to the municipality did not bear fruit. On 11 September 2006 Flemming wrote to Paton, advising that in terms of clause 18 the actual size of the property should have been 3 646m^2 whereas *"the size of the developed property is now only 2 651 square meters"*. (Flemming testified that the word *"developed"* here should have read *"developable"*. The figure of 2 651 m^2 should have been 2 661 m^2 – he had misread the figure on Gildenhuys' new sketch plan.)

22. Paton through his attorneys denied responsibility. A letter of demand dated 6 December 2006 was followed in February 2007 by the issue of summons in the present case. At that stage the averment was that the actual size of the property was only 2 651m^2. There was a claim for damages of R1 195 994 for loss of profit, alternatively for a price reduction of R500 000.

23. It seems that the first actual survey of Erf 790 was the one performed by the plaintiff's expert Mr Blyth and attached to the rule 36(9) notice filed during May 2011in respect of his evidence. According to this survey the area south of the Impala Road was 3 025 m^2. The survey diagram also reflected the existence of land forming part of Erf 790 lying to the north of the actual road, though Blythe's survey did not state the area thereof. CAT then amended its particulars of claim by replacing the previous

alleged actual size of 2 651m^2 with 3 025m^2. CAT also deleted its claim for loss of profit and reduced its claim for a price reduction from R500 000 to R425 000.

24. Paton's expert, Mr Visagie, thereafter performed his own survey, the results of which were reflected in an expert summary filed on 10 August 2011. This survey revealed that the area south of the road was 2 989 m^2 (not 3 025m^2, as per Blyth's survey) while the area north of the road was 772 m^2. These figures were accepted by all parties as being correct for purposes of the trial.

25. CAT is still the owner of Erf 790. The land remains undeveloped.

The meaning of clause 18

26. In my view the phrase *"the actual size of the Property"* in the third sentence of clause 18.2 means the actual size of the land south of Impala Road. Although this meaning may not be apparent from the words of clause 18.1 in isolation, the clause refers to and incorporates the sketch plan, annexure "A". From that plan it is perfectly clear that the area of 3 464m^2 was reflected as being the area south of Impala Road. The same is also true of annexure "B", which has been incorporated into the contract.

27. I do not think that rectification is necessary to reach this conclusion. In argument Mr Steenkamp said that the proposed insertion (by way of rectification) of the word *"developable"* (so that the relevant phrase in the third sentence of clause 18.1 would read *"the actual developable size of the Property"*) was not inserted to convert the clause into a guarantee that the area south of the road was actually developable but rather to identify the land covered by the clause, namely the land south of the road, which is the land that had been pointed out to CAT as being the development opportunity. I do not think the word *"developable"* is apt to

convey this restricted meaning, and as I have said I do not think that rectification is necessary for that limited purpose.

28. The next question is to determine the contractual character of clauses 18.1 and 18.2.

29. Clause 18.1 incorporates information as to the size of the land. The recordal of the information as facts acknowledged by CAT is not inconsistent with a conclusion that clause 18.1 is a contractual term obliging Paton to deliver land measuring 3 464m^2 south of Impala Road or (to put it differently) that Paton warranted that this was the extent of such land. For example in *Schmidt v Dwyer* 1959 (3) SA 896 (C) a deed of sale, in describing the merx, recorded that the property included *"approximately 120 000 vines planted thereon"*. The plaintiff alleged that this was a warranty that the farm would have approximately 120 000 vines. An exception to the claim was dismissed. With reference to *Naude v Harrison* 1925 CPD 84, Van Wyk J (with whom De Villiers JP concurred) said the following (at 898H-899B):

> *'The general rule is that where a vendor makes a representation or an assertion of a positive and material fact in regard to the quality or quantity of the thing sold such conduct on his part amounts to a definite promise or warranty, for a breach of which he will be liable. (See Corbett v Harris 1914 CPD 535 at p543.) The primary object of a deed of sale is to record the terms of a contract between the parties, and it follows that any statement in such a document prima facie constitutes a term of the contract unless it appears from the contract itself or other admissible evidence that the parties did not so intend. It seems obvious that the number of vines on the farm sold must have been one of the important factors in determining the purchase price of the property, and I fail to see why the parties should have included this statement in regard thereto merely to describe the property.'*

30. The inclusion of clause 18.1 under the heading *"Special Conditions"* is a *prima facie* indication that the content thereof was intended to have contractual force. The second sentence of clause 18.1 records an acknowledgment that the purchase price of the property was affected by its actual size. It is thus my view that in terms of clause 18.1 Paton would

be guilty of a breach if the property delivered by him had an area south of Impala Road which was smaller than 3 464m^2.

31. If the statement of size in the third sentence of clause 18.1 were not a term of the contract, I would conclude that it was at very least a representation by Paton of the size of the land. Such representation would fall within the concept of *dicta et promissa* as expounded in *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A) at 417H-418C. The representation was a statement bearing on the quality of the merx. The representation went beyond *"mere praise or commendation"*: the statement was material to CAT's known purpose of buying the land for development, was one of fact and not personal opinion, and was self-evidently relevant to the price to be paid for the property. Even if the representation were innocent the Aedilitian remedies (here in the form of the *actio quanti minoris*) would be available. (In his written submissions on absolution, which he also relied on at the end of the case, Mr Badenhorst said that that to rely on the *actio quanti minoris* the buyer would have to prove that the representation was negligent but that is incorrect, as appears clearly from *Phame.*)

32. Clause 5 of the sale agreement provided that the sale was voetstoots and that no representations had been made *"other than the representations contained herein"*. The representation to the effect that the actual size of the property was 3 464m^2 is indeed contained in the written agreement, namely in clause 18.1. CAT would thus be entitled to such relief as is afforded by the *actio quanti minoris*.

33. Accordingly, the question whether the size of the property as stated in the third sentence of clause 18.1 is to be regarded as a term or merely as a representation is relevant only if the relief afforded in the two cases would differ. CAT claims the difference between what it paid for the land as warranted or represented (R1.7 million) and the value of what was

actually delivered (allegedly R1.275 million). As will appear hereunder, this measure of the relief to be afforded is permissible on either basis.

34. In addition to the term or representation regarding the size of the property, CAT pleaded that clause 18.2 was a representation that the land could accommodate eight development opportunities as reflected in annexure "B" to the agreement. (Mr Steenkamp during the trial disavowed any intention to argue that clause 18.2 contained a contractual term or warranty to this effect.) The first part of clause 18.2 is a statement that Erf 790 is located in an area earmarked by the municipality for residential development. That statement was not alleged by CAT to be untrue. The balance of clause 18.2 does not in my view constitute a representation that the land south of Impala Road could be developed with eight subdivided erven as reflected in Mostert's plan, annexure "B". On the contrary, the clause notified CAT that it would need to obtain the requisite approvals from the municipality in order to do something along the lines of annexure "B". Implicit in that notification is the possibility that the municipality might *not* give the required approvals.

35. At most, the second part of clause 18.2 was a representation of Paton's belief (or perhaps Mostert's belief) that a development of that kind had a reasonable prospect of being approved. A person can, of course, make a misrepresentation about his own state of mind (see *Adam v The Curlews Citrus Farms Ltd* 1930 TPD 68 at 82-83) though such a misrepresentation by its nature would be dishonest (*Ruto Flour Mills (Pty) Ltd v Adelson* 1959 (4) SA 120 (T) at 122H-123A). CAT's pleaded case is not that Paton and/or Mostert misrepresented their own belief as to what could be done on the property; CAT relied on a misrepresentation of an objective fact, namely that eight subdivided development opportunities were possible. I do not consider that such a representation is contained in clause 18.2.

36. Mr Steenkamp also relied on statements made by Mostert to CAT's representatives prior to the conclusion of the sale. In the light of clause 5.2 of the agreement, CAT is not (in the absence of fraud) entitled to rely on any representations other than those contained in the agreement. Mr Steenkamp did not argue that any fraudulent misrepresentations had been proved.

37. I thus find that clause 18.1 contained a term or representation that the size of the land south of Impala Road was 3 464m^2 in extent but that no term or actionable representation concerning the number of development opportunities has been proved.

Relief and proof of quantum

38. The *actio quanti minoris*, based on deficiencies in the merx as measured against the *dicta et promissa* made by the seller, entitles the purchaser to recover the difference between what he paid and the merx's actual value (*Labuschagne Broers v Spring Farm (Pty) Ltd* 1976 (2) SA 824 (T) at 825F-828H; *Gannet Manufacturing Co (Pty) Ltd v Postaflex (Pty) Ltd* 1981 (3) SA 216 (C) at 226A-B). The authorities do not require the purchaser to prove that the price he paid was the market value of the merx as represented, though I should say that in the present case the price paid provides strong *prima facie* evidence that the market value of the property as represented was indeed R1.7 million – both buyer and seller were knowledgeable parties negotiating at arm's length (cf *Crawley v Frank Pepper (Pty) Ltd* 1970 (1) SA 29 (N) at 37H-38A).

39. Where the statement as to quality has been made a term of the contract, the buyer will have additional remedies. Under the *actio empti* he will be entitled by way of damages to his full positive interesse, i.e. to be placed in the financial position he would have been in had the term been made good. In the present case that might have entitled CAT to recover loss of profits. But there is authority that the purchaser is instead entitled to

claim a reduction in price on *quanti minoris* principles (see, eg, *Maennel v Garage Continental Ltd* 1910 AD 137 at 146-147; *Evans v McKenzie* 1916 NPD 404 at 408; *Wilson v Simon and Lazarus* 1921 OPD 32 at 36; De Wet & Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5de Uitgawe at 346). This seems sound in principle. The availability of the Aedilitian remedies based on *dicta et promissa* does not require, but also does not exclude the possibility, that the statement as to quality was a contractual term. The very phrase *dicta et promissa* (things said and promised) suggests that the Aedilitian remedies are indifferent as to whether that which was said concerning the quality of the merx was a representation or a term. In *Phame supra* Holmes JA quoted with apparent approval from Mackeurtan *Sale of Goods in South Africa* (3rd Ed), where the learned author said that the *actio quanti minoris* is available when the seller has made *"any representation or warranty"* about the quality or condition of the merx (415G-H). And at 416H-417C Holmes JA said that it was unnecessary and confusing to try to fit a *dictum et promissum* into a juristic niche like warranty or term. It is not necessary for a purchaser who invokes the *actio quanti minoris* to aver and prove a breach of a term of the contract. This indicates that it does not matter whether the statement is a representation or term – *quanti minoris* relief is available provided the statement is of the kind summarised by Holmes JA at 417H-418C. This conclusion accords also with *SA Oil and Fat Industries Ltd v Park Rynie Whaling Co Ltd* 1916 AD 400 where buyer was held entitled to *quanti minoris* relief in respect of a statement of quality which the court found to be a term of the contract.

40. The question thus is whether CAT has proved the value of Erf 790 as actually delivered. As noted, the pleaded case is that the actual value was R1.275 million and that the price reduction to which CAT is entitled is thus R425 000.

41. In support of this value, CAT adduced, firstly, the evidence of Mellet in his capacity as an expert quantity surveyor, project manager and building contractor. Mellet's quantification of the reduction in price was a simple one. He assumed that in its represented state the property could accommodate eight subdivided erven with a land cost per erf of R212 500 (R1.7 million ÷ 8). If only six subdivided erven of similar dimensions could be developed, the land cost per subdivided erf would rise to R283 333,33. To a developer the raw land was thus worth R425 000 less than R1.7 million (R212 500 x 2; or, which is essentially the same thing, the additional cost per opportunity of R70 833,33 x 6). Mellet also did a calculation which allegedly showed that the total loss of profit in consequence of there being space for only six subdivided erven was R1 219 999,96.

42. Since CAT is not claiming positive interesse in the form of loss of profit, the second of these calculations appears to me to be irrelevant. Mellet did not attempt to relate the alleged diminution in potential profit to a reduction of R425 000 in the value of the raw land.

43. A problem in the way of both of Mellet's calculations is their dependence on the difference between eight and six development opportunities. This might have been an acceptable approach if the claim was based on a term or representation that eight development opportunities of the size indicated on Mostert's plan would be possible. However I have found that CAT has not proved a term or representation to that effect. Moreover, the expert evidence which CAT adduced from Viljoen of Delplan was that it was most unlikely that the municipality would have permitted eight subdivided erven, even if the land had been as large as represented (3 464m^2). This was because the size of the subdivided erven shown on Mostert's plan would have been considerably below what the municipality would have approved in that area. Although the non-expert evidence of Paton and Mostert casts some doubt on Viljoen's

view, I do not think in the circumstances that CAT is entitled to ask the court to accept a method of valuation which rests on the premise that if the land had been 3 464m^2 in extent it could have accommodated eight subdivided erven.

44. The other evidence offered by CAT in regard to value was from Ms Chantelle Grard ("Grard"), an estate agent. There were data errors in her first two expert summaries (dated 25 February 2010 and 26 July 2011 respectively) which rendered her methodology in those summaries unreliable. In her third expert summary (dated 23 August 2011) she adopted a different and fairly simple approach, and this was the approach she supported in her oral testimony. She said that Erf 790 was a unique property in the area (a reasonably large piece of undeveloped land zoned for agricultural use but with the likelihood that it could be rezoned and developed for residential use). She could find no comparable transactions for similar land in the area.

45. Ms Grard testified that she had been engaged by CAT to resell the land. She began during 2007 to market the property for R1.3 million, based on her understanding that the property was 2661m^2 in extent. She showed the property to many potential buyers. No offers were received in 2007. In February and March 2008 two offers were made.

46. The one offer was made in March 2008 by Mystic Blue Trading 402 (Pty) Ltd, a buyer that Grard had introduced. The offered price was R1.29 million. CAT accepted this offer, but its acceptance was strictly speaking a counter-offer, since Flemming insisted that the offer signed by the purchaser be amended by adding an express recordal that the buyer was aware that only 2 651m^2 of the erf was developable, as reflected in Gildenhuys' revised sketch plan of July 2006 (which was annexed). Ms Grard testified that in marketing the property she had informed the buyer that this was the size of the land but that the buyer

had nevertheless refused to initial Flemming's insertion. She thought the buyer had got cold feet about the purchase.

47. The other offer had been made in February 2008 by joint buyers (Messrs Gruber and Hopkins). They had been introduced by another estate agency, Seeff Properties. These buyers offered R1.22 million. Again it appears that the buyers backed out when they were asked to initial an insertion (made by Flemming) about the size of the property. Grard was not involved in this transaction and there was no evidence as to what the buyers had been told about the size of the property before submitting their offer. However, given CAT's experience in purchasing the property from Paton and Flemming's insistence of a clear recordal of the actual size of the property, it would be surprising if CAT had not instructed the agents to tell prospective buyers about the actual size of the property.

48. Grard's opinion was that in the absence of comparable transactions for other properties, the unsuccessful attempts to sell the property for R1.3 million in 2007 and the offers of R1.22 million and R1.29 million in early 2008 provided a reasonable basis for concluding that the property was worth no more than the figure of R1.275 million which Mellet had arrived at. She testified that the market had not yet weakened materially in 2007 or the first half of 2008.

49. Mr Badenhorst criticised the adequacy of this evidence. Firstly, he submitted that CAT should have called a sworn valuator, not an estate agent. I reject that criticism. Estate agents by the nature of their work are able to provide expert views on property values. Secondly, he argued that Grard was wrong about the absence of comparable transactions. However, Mr Badenhorst's submission in this regard was not that there were comparable transactions for sales of undeveloped land of the approximate size of Erf 790 but that there were comparable transactions for sales of erven of the approximate size of the subdivided

erven that might have been created on Erf 790. It appears from Grard's most recent expert summary that the sales statistics annexed thereto were in respect of serviced erven. The type of exercise contemplated by Mr Badenhorst would entail determining how many subdivided erven could be created on Erf 790, what the costs of rezoning, subdividing and servicing the erven would be (this would presumably include the cost of constructing the road giving access to the erven), how long all of this would take and what the intervening holding costs would be, what those erven could then be sold for on completion by identifying from the statistics comparable serviced erven, and what an acceptable profit margin for a developer would be. Only after an exercise of this kind could one derive the price a developer might have been willing to pay for the raw land. Such an exercise would inevitably involve a substantial measure of speculation and uncertainty.

50. In principle, therefore, I think the evidence afforded by the subsequent attempts to market the very same land, at a time when it was known that the land was materially smaller than 3 464m^2, provides a reasonable basis for drawing conclusions as to the land's value (cf *Rademan v Whewell* 1925 OPD 14 at 15). However, I must assume that not only Grard but also Seeff Properties informed prospective buyers that the land south of Impala Road was only 2 661m^2 in extent. This was the position as it was then understood to be. The premise of CAT's claim is that a smaller area of developable land translates into a lower value. This is an eminently plausible proposition but one must then assume that if prospective buyers in 2007 and 2008 had known that the true area of the land was 2 989 m^2 rather than 2 661m^2 they would have been prepared to offer more than they did.

51. Faced with this position, the court must in my view do the best it can on the available evidence (see *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) at 969H-970H; *Hushon SA (Pty) Ltd v Pictech (Pty) Ltd &*

Others 1997 (4) SA 399 (SCA) at 412G-H; *De Klerk v Absa Bank Ltd & Others* 2003 (4) SA 315 (SCA) paras 37-39; cf also the *SA Oil* case *supra* at 413-414 and *Corbett v Harris supra* at 545-548). Paton, who is himself a qualified valuator, did not call any expert evidence on the question of the land's true value. I entertain no doubt that 2 989m^2 of developable land south of Impala Road must be worth less than 3 464m^2 would have been – the land as delivered was 13.7% smaller than as warranted or represented. Grard's evidence placed reliance on offers made in the belief that the land was 23.2% smaller. If one takes the highest price offered for the land in early 2008, namely R1.29 million, as the value the land would have had in 2006 had it been only 2 661m^2 in extent, one would arrive at a reduction of R410 000 for a deficit of 803m^2, i.e. R510,59 per m^2. If one applies this same rate to the actual deficiency of 475m^2, the reduction in price would be R242 530. Put differently, the derived market value of 2 989m^2 would be R1 457 470.

52. To test this figure, one could use the rate per m^2 based on a price of R1.7 million for 3 464m^2, namely R490,76 per m^2. This would translate into a reduction for the missing 475m^2 of R233 111, or a derived value for 2 989m^2 of R1 466 889.

53. I appreciate that reduction in value may not be linear. The figure derived from Grard's evidence suggests that the decrease in value is somewhat higher than would be obtained by using a rate per m^2 derived from the price of R1.7 million as applied to an area of 3 464m^2. Nevertheless, and adopting a conservative approach against CAT (cf *Emslie v African Merchants Ltd* 1908 EDC 82 at 95), I do not think a reduction of R230 000 (which is what I propose to award) would overcompensate CAT or be unfair to Paton.

54. Mr Badenhorst argued that Ms Grard's failure to take any account of the land north of Impala Road (772m^2) was a fatal flaw in CAT's case. The existence of any land north of Impala Road seems first to have come to

light in Blyth's survey, the results of which were furnished in an expert summary filed in May 2011. The area north of the road was first stated in Visagie's expert summary filed on 10 August 2011. The sale agreement of April 2006 was concluded in ignorance of such land. Any value it might have for CAT would be purely fortuitous.

55. Paton testified that the land immediately to the north of Impala Road is steeply banked. That this is so appears from the photographs adduced in evidence. There was evidence that the municipality would not permit access to the area south of the road directly off Impala Road, hence the need to use the service road running down the western boundary of Erf 790. Commonsense dictates that it would be even less likely for access to be permitted off Impala Road to the north. The area of 772m^2 is a relatively narrow strip, and to my eye it seems most unlikely that anything could be done with the land. The possibility that development of this land might be permitted was not once raised in evidence. Ms Grard was not asked whether the land had any value. I thus do not believe that CAT's ownership of this land affects the price reduction to which it is entitled. Indeed, it is quite possible that ownership of the land north of the road is a burden, since even though it might be unusable it will presumably attract rates.

Concluding matters

56. I thus propose to make an award in CAT's favour of R230 000 together with interest at the prescribed rate from 6 December 2006, being the date of demand. (It has not been necessary for purposes of reaching my conclusion to consider CAT's alternative delictual cause of action based on negligent misrepresentation.)

57. The costs of the third party, Gildenhuys, must be paid by Paton. It seems clear that Gildenhuys was joined on a misconceived basis as to what he had been engaged to do.

58. Mr Steenkamp asked for the qualifying costs of CAT's expert witnesses, namely Blythe, Mellet, Grard and Viljoen:

(a) Blythe: Although Blythe in the event did not testify, this was because agreement was reached in the light of a similar expert report filed on behalf of Paton. In the circumstances Blyth's qualifying expenses should be allowed.

(b) Mellet: I have rejected the premise of Mellet's approach to quantifying the price reduction. I do not think it would be just in the circumstances for Paton to bear these qualifying expenses.

(c) Grard: Her qualifying expenses should be allowed, excluding however the costs associated with her first two expert summaries.

(d) Viljoen: His expert evidence concerned the number of units that could be developed on the land south of Impala Road. This evidence was relevant to CAT's claim based on a representation that eight subdivided erven could be developed on the land. Since in my view CAT was not entitled to advance such a claim, Paton should not have to bear Viljoen's qualifying expenses.

59. The court's order is as follows:

(a) The defendant is directed to pay the plaintiff R230 000 plus interest at the prescribed rate from 6 December 2006.

(b) The defendant is directed to pay the third party's costs, including all costs reserved in prior interlocutory proceedings between the defendant and the third party.

(c) The defendant is directed to pay the plaintiff's costs, including the qualifying costs of the experts Jonathan Blyth and Chantelle Grard, but excluding in the case of Ms Grard the costs associated with the rule 36(9)(b) notices dated 25 February 2010 and 26 July 2011.

ROGERS AJ
9 SEPTEMBER 2011

Appearance for Plaintiff	Mr M Steenkamp Instructed by Balsillies Inc Cape Town
Appearance of Defendant	Mr DJ Badenhorst Haycock & Associates George