IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)
DATE: 04/05/2005
CASE NO: 372/2005

UNREPORTABLE

In the matter between:

NICOLAAS MARTHINUS PRINSLOO N.O.	1ST APPLICANT
JOHANNA JACOBA DE BRUYN N.O.	2ND APPLICANT

And

GOLDEX 15 (EDMS) BPK	1ST RESPONDENT
ABSA BANK BEPERK	2ND RESPONDENT
DIE REGISTRA TEUR VAN AKTES	**3RD RESPONDENT**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

JUDGMENT

WEBSTER J

On 24 February, 2005, I made an order that the application herein be dismissed with costs, such costs to include the costs of the two previous court appearances. I undertook to furnish my reasons upon a request therefore. I have been advised that such a request has been made. My reasons are set out below.

The applicants sought an order against the respondents in the following terms:

"1. Dat hierdie aansoek ingevolge die bepalings van Reël 6(12) *van die Eenvormige Hofreëls hanteer word en dat*

kondonasie verleen word ten aansien van die wyse en vorm van betekening;

2. *Dat die Eerste Respondent gelas word om registrasie van die eiendom bekend as Resterende Gedeelte van die Plaas Rykdom 278, Registrasie Afdeling: K.R., Limpopo Provinsie gehou kragtens Akte van Transport T4004/99 te neem teen betaling van die koopprys ooreenkomstig klousule 4 van die skriftelike koopkontrak gedateer 4 Oktober 2004;*

3. *Dat die Eerste Respondent en die Tweede Respondent gelas word om die notariele verband en dekkingsverband 5005 vermeld in Aanhangsel 'X// hierby aangeheg/ te registreer en toe te sien dat betaling van die bedrag van R400 000.00 deur die Tweede Respondent aan die Applikante geskied ooreenkomstig gemelde aanhangsel'*

4. *Dat die Derde Respondent gelas word om toe te sien tot registrasie van die transport van die eiendom verwys na in bede 2 hierbo/ tesame met die gelyktydige transaksies wat daarmee gepaardgaan asook die notariele verband verleen deur die Eerste Respondent aan die Tweede Respondent soos hierbo vermelct·*

5. *Dat die Eerste- en Tweede Respondente gesament/ik en afsonderlik gelas word om die koste van hierdie aansoek te betaalop 'n skaalsoos tussen prokureur en kliënt;*

6. *Dat die Derde Respondent gelas word om nie die transaksies met betrekking tot die transport vermeld in bede 1of 2 hierbo te verwerp/ hangende die afhandeling van hierdie aansoek nie."*

It is common cause that on 4 October 2004 the first applicant, acting in his capacity as the trustee of the second applicant (the Trust), entered into a written agreement with the first respondent duly represented by its director, JACOBUS WYNAND SCHEEPERS, (the deponent to the answering affidavit of the first respondent), in terms of which the second applicant sold certain immovable property registered in the name of the Trust to the first respondent (the property). The transaction was financed by the second respondent which provided the necessary guarantees.

The necessary transfer documents were prepared and were ready for lodgement with the third respondent for the transfer of the property when the second respondent, through its attorneys, notified the applicants that the transfer should be deferred until such time that the issue of a "land claim" against the property sold to the first respondent is dealt with. The applicants then launched the application before me.

The issue between the parties is whether the first applicant is guilty of having made a material fraudulent misrepresentation to the director of the first respondent that no valid land claim had been made or was pending, in relation to the property, when the agreement of sale was entered into by the parties.

J.W. Scheepers avers that since his first visit to the farm he enquired from the first applicant whether any land claim had been made against the property. The issue had been discussed on various occasions thereafter and on each occasion the first applicant had re-assured him that there were no such claims. After the written agreement was entered into and the first respondent took occupation of the farm, a certain ex-employee of the second applicant who had taken up employment with the first respondent, *viz*. PHIRI, reported to J.W. Scheepers that certain tribesmen had, to the knowledge of the first applicant, visited their forefathers' graves that were on the property. It was common cause that such graves do indeed exist. J.W. Scheepers avers further that he thereafter discussed this issue with a neighbouring farmer who then provided him with two letters from the Regional Land Claims Commission which indicated that a land claim had been lodged over the farm "RYKDOM" of which the property forming the subject matter of the dispute is a part. Scheepers further avers that a meeting of the local agricultural union had been held in 2003 regarding land claims in the area. In a supplementary affidavit that was admitted, the first respondent further avers that one RUDI SWANEPOEL, an estate agent working in the area where the property is situated, approached the first applicant in 2003 and enquired whether he could market the property, and that first applicant informed Swanepoel that a land claim had been lodged against the farm. Swanepoel then informed the first respondent that he was not willing to place the property on the market under those circumstances. These

allegations are confirmed on oath by Swanepoel. The first applicant's former employee, Phiri, confirms the visit by tribesmen to the graves mentioned.

The first applicant relied on paragraphs 12.2 and 18 of the written agreement of sale (I shall revert to these in due course). It further relies on the first respondent's failure to cancel the agreement immediately upon learning of the existence of the graves and the fact that the farm was the subject of a land claim. Finally, it relies on the fact that the land claim has not yet been advertised and, as such, it cannot be said that there is a valid claim in accordance with the provisions of Act No. 22 of 1994. It was argued that there was no proof that the claim would succeed or not. It was submitted in argument that even if the claim succeeded the first respondent would be entitled to compensation.

Paragraph 12 of the written agreement provides:

*"**VOETSTOOTS***

*12.1 Die **KOPER** erken hiermee dat hy die **EIENDOM EN BATES** besigtig het, tevrede is daarmee en dit voetstoots koop.*

*12.2 Die **KOPER** verbind hom verder hiermee en verk/aar dat hy nie geregtig sa/ wees om enige aksie voortspruitent uit die **OOREENKOMS** in te ste/ teen die **VERKOPER,** vir enige gebrek hetsy sigbaar of verborge aan die **EIENDOM** of die verbeteringe daarop, of vanweë enige voorste//inge of waarborg deur die **VERKOPER** in verband met die **EIENDOM** gemaak nie."*

Paragraph 18 of the said agreement provides:

*"**REGTE MET BETREKKING TOT OKKUPEERDERS***

*18. Die **VERKOPER** bevestig ten opsigte van die **EIENDOM** dat vo/gens sy beste kennis en wete*

*Daar geen eis ingestel is vir die herstel van 'n reg op die **EIENDOM** insluitend die belange van 'n huurarbeider deelsaaier gewoonte-regtelike belang,* 'n *trustbegunstigde of voordelike okkupeerder van minstens 10 (tien) jaar nie; Verder het die Streekgrondeise Kommissaris geen kennisgewing van enige sodanige eis vir herstel van grondregte.*

*18.1 In die algemeen bevestig die **VERKOPER** dat die **EIENDOM** nie deur enige per soon okkupeer beset bewoon gebruik/ verbou/ beweei ensovoorts word nie en dat die **KOPER** ongestoorde besit en okkupasie van die **EIENDOM** sal ontvang."*

The letters referred to above read as follows:

"Annexure S2

E J Honiball Attorneys
P.O. Box 257
POTGIETERSRUS
0600

Dear Sir

***ENQUIRIES REGARDING LAND CLAIMS IN TERMS OF THE RESTITUTION OF LAND RIGHTS ACT;* 1994 *(ACT NO.* 22 *OF* 1994)**
PROPERTY DESCRIPTION: PORTIONS 3 AND 4 OF THE FARM RYKDOM 278 KR AND THE FARM STERKFONTEIN 310 KR, MAGISTERIAL DISTRICT OF POTGIETERSRUS, NORTHERN PROVINCE

Your letter dated 2 August 2000 refers.

According to our office records there are no restitution claims being lodged against the abovementioned properties.

It will be appreciated if you can give this office and indication why you send us the abovementioned letter.

Your co-operation in this regard will be appreciated

Kind Regards

REGIONAL LAND CLAIMS COMMISSIONER:
MPUMALANGA & NORTHERN PROVINCE
DATE: 2000-10-19"

"Annexure S3

EJ HONEY BALL ATTORNEYS
P.O. BOX 257
POTGIETERSRUST
0600

ATTENTION: EJ HONEY BALL

PER FAX (015) 491 6274

Dear Sir/Madam

***ENQUIRIES REGARDING LAND CLAIM IN TERMS OF THE RESTITUTION OF LAND RIGHTS ACT*, 1994 *(ACT NO.* 22 *OF* 1994)**

Your enquiry dated 04th August 2003 refers.

The Regional Land Claims Commissioner for Limpopo would like to inform you that there is a restitution land claim lodged on the under-mentioned property:

- ***FARM RYKDOM 278 KR** - The claimant is **MAPELA COMMUNITY** under **KRP NO. 1764***

According to the records in our database/ there is no information available at this stage on the under-mentioned property:

- ***FARM STERKFONTEIN 306 KR***

Please note that there are land claims which have not been attended to since lodgement Subsequent/~ if it emerges during the process of investigations that there is a claim on the said farm/property, and if the land claim satisfies the requirements of the Restitution of Land Rights Act (Act no. 22 *of* 1994*) for validity*

purpose/ the Commission will send you the relevant correspondence.

Please note that it is not within the powers of the Regional Land Claims Commissioner to grant or withhold permission for development or alienation in respect of land subject to a claim until such a claim has been gazetted unless such development would constitute an obstruction to the achievements of the aims and objectives of the Restitution of Land Rights Act 22 of 1994. In such instances an application for interdict can be brought in terms of Section 6(3) of the Restitution Act in the Land Claims Court at any stage/ after such a claim has been lodged even before notice of such a claim has been published in terms of Section 11 of Restitution of Land Rights Act 22 of 1994.

We trust you will find the above in order.

MASHILE MOKONO
REGIONAL LAND CLAIMS COMMISSIONER: LIMPOPO
DATE: 03/09/2003"

It was conceded in argument that there is a claim in terms of the Restitution of Land Rights Act No. 22 of 1994 against the land that forms the subject matter of this application. It is further clear that this issue was of specific relevance when the parties entered into the written agreement of sale. Paragraph 18 of the agreement, considered against the contents of the letter, Annexure "52", establish this clearly. It is my considered view that the issue of the land being the subject of a land claim was a material term of the agreement between the parties. The reason for this is not difficult to contemplate. The purchase price of the property which included livestock, equipment and the immovable property was R2 600 000.00 (Two million six hundred thousand Rand). The immovable property was bonded and a notarial bond

was to be passed over movable assets on the farm. The first respondent's intentions were clearly to undertake farming seriously. Under such circumstances the security of tenure is a fundamental consideration. In my view it was imperative for the first respondent to have some sort of guarantee that no claim had been made for the restitution of the property by any person.

The presence of graves on the property and the affidavit by PHIRI that tribesmen visited the graves is an important relevant factor. Whilst it is undesirable that I comment on the validity of the land claim, there can be no doubt that such a claim exists. The evidence of 5wanepoel considered in the light of annexure "53" quoted above is convincing and is substantiated on a balance of probabilities. It is my considered view that the first applicant, when he entered into the written agreement of sale of the farm did so in the full knowledge that the farm was the subject of a land claim and that he deliberately withheld this information from 5cheepers, the representative of the first respondent. Annexure "52" was held out as a subterfuge and a ruse to deliberately mislead the first respondent.

It is against this background that clause 12 of the agreement must be viewed. It is an almost unwritten rule that most contracts, particularly of sale and especially immovable property, that a "voetstoots" clause be incorporated. 5uch a clause is essentially to protect the seller of the merx against latent defects or defects that are patent and are visible or discernable to a

prudent purchaser exercising reasonable care, or against communications or representations that are not clearly recorded. Clause 12 of annexure "P3", the agreement, means exactly that in my view.

It was submitted by Mr. Teessen, for the first respondent, that the "voetstoots" clause is no valid defence to the first respondent's right to cancellation of the agreement. I agree. A misrepresentation made either prior to the conclusion of or in the agreement itself is of no avail to its author. (Reyneke v Botha 1977(3) SA 20 (W); Ornelas v Andrew's Cafe and Another 1980(1) SA 379 (W)). Further, it is not possible to contract out of the consequences of fraudulent misrepresentation (Wells v S.A. Alumenite Co 1927 AD 69). The "voetstoots" clause is of no avail to the applicants.

It was submitted by Mr Güldenpfennig, for the applicants, that the Restitution of Land Act does not bar or prohibit the transfer of the property as the claim has not yet been advertised or gazetted. He submitted further that the transfer of the farm should be executed. Mr Teessen for the respondents submitted that the argument was fallacious in that Scheepers states clearly that *"Daar was geen twyfel tussen myself en die Eerste Applikant (wie namens die Trust opgetree het) dat my bedoeling was dat ek meegedeel het dat ek nie be/angste/ indien daar enige aansprake (hetsy afgekondig in die Staatskoerant of nie) teen die betrokke grond is nie en dat die Eerste Applikant se mededelings dat daar*

geen grondeise teen die eiendom was nie, 'n *soortgelyke bedoeling gehad het."* What the respondent says in this regard has to be admitted in the light of my finding above.

I agree with Mr Teessen. As I have indicated above, the provision that there was no "land claim" against the property was a material term whose breach was fundamental and entitled the second respondent to resile from the contract, as it did. The second respondent accordingly acted within its rights in cancelling the agreement as the breach by the applicants could not be rectified.

With regards to the issue of costs, the normal rule is that costs should follow the result. I can find nothing in the conduct of the respondents to justify an order that they be mulcted for costs.

The application was accordingly dismissed with costs, as set out above.

G. WEBSTER

JUDGE IN THE HIGH COURT

Date of hearing	24/02/2005
Counsel for the Applicants	Adv. Gldenpfennig
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