IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 13868/2013

29/1/16

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

LINDLEY FARM 528 (PTY) LTD PLAINTIFF

and

CRADLE CITY (PTY) LTD DEFENDANT

JUDGMENT:

STRIJDOM AJ:

A. INTRODUCTION

1. The Plaintiff instituted action against the Defendant in which the Plaintiff claims substantial amounts of money from the Defendant, based upon 3 claims which .... all relate to the sale by the Plaintiff to the Defendant of an immovable property, Remaining Extent of Portion 13 of the farm Lindley, 528, Registration Division JQ, Province of Gauteng, measuring 90,2408 hectares and held under deed of transfer T3914/1990 ("the property").
2. The Defendant disputes the Plaintiff's claims and instituted a counterclaim in which it claims·damages from the Plaintiff, also for a very substantial amount.

THE CONTRACT:

3. The conclusion of the written agreement of sale between the parties, as well as certain addenda thereto, are common cause.
4. On 23 March 2009 the relevant agreement of sale was concluded.

   See: ***Agreement of sale, trial bundle,*** p.11
5. The agreed purchase price for the property is the amount of R112 million. See:

   Agreement of sale, trial bundle, par.2, p.2
6. The purchase price was payable in different tranches at future dates, and it was also recorded that by the time the agreement was concluded the Defendant had already paid a portion of the purchase price.
7. Paragraph 4 of the sale agreement reads as follows:

   "Possess on and risk:

   Possess on shall be given by the seller to the purchaser on the date of transfer, together with vacant occupation, from which date the purchaser shall be entitled to all benefits from and be liable to all risks of ownership in respect of the property including liability for rates and taxes and any other charges or levies on the

   property from such date."

   See: ***Trial bundle,*** clause 4, p.6
8. It is common cause between the parties that there were, at all relevant stages, and there are still currently, a large number of squatters occupying the property.
9. On 4 May 2009, before transfer of the property to the Defendant, the Plaintiff wrote a letter to the Defendant which reads as follows:

   "The company (that is a *reference to the Plaintiff) will fully comply with the provisions of clause 4* as *set out in the agreement of sale*

   dated 2310312009.

   Should there be any unlawful occupiers present on the property at the date of registration of the transfer of the property, we undertake to remove any such occupiers at our cost within a *reasonable time but not later than 2810212010, said undertaking will only apply to the number of unlawful occupiers that might be present on the property at the time* as *stated above.*

   We confirm that Lindley Farm 528 (Pfy) Ltd (which is again a *reference to the Plaintiff) will not be held responsible for the removal of any additional*

unlawful occupiers which might occupy the property after date of registration of the transfer."

10. The property was transferred to the Defendant on 7 May 2009, and by that date the squatters had not been removed from the property.
11. Upon the same day that the property was transferred to the Defendant the parties concluded a further addendum to the sale agreement, in the form of an *"indemnity and undertaking"* which the Defendant attached as annexure "A" to its plea.
12. The indemnity and undertaking reads as follows:

"We, the undersigned, Lindley Farm 528 (Pty) Ltd ("Lindley Park 528'J *hereby-*

1.1. *agree and undertake in favour of Cradle City (Pty) Ltd ("Cradle City"), by no later than 31 August 2009 at our cost, to take all such steps and to do and procure the doing of all thal is requisite in order to lawfully evict all squatters including, but not limited to all on the list attached hereto, marked* as *appendix 1, occupying the Remaining Extent of Portion 13 of the farm Lindley 528, registration JQ, the Province of Gauteng, measuring 90,2408 hectares ("the land'J* as *at the date upon which the land is transferred into the name of Cradle City in the relevant Deeds Office ("the Squatters');*

1.2. *indemnity and hold Cradle City harmless against –*

1.2.1. *any and all claims,* losses, *damages, actions, liabilities, expenses, including all legal fees and expenses on an attorney and own client basis (collectively, the "claim/s") which may be made against Cradle City –*

1.2.1.1. as a *result of* a *breach of any or all of our undertakings referred to in this indemnity;*

1.2.1.2. *arising from or ancillary to or connected with the occupation of the squatters on the land and/or the eviction or removal of the squatters from the land;*

1.3. *agree and undertake in favour of Cradle City to make payment under this indemnity* as *soon* as *Cradle City becomes obliged to make any payment in respect of any of the claim/s in an amount equal to the amount paid by Cradle City to settle the claimls."*

See: ***Indemnity and undertaking, trial bundle,*** p.92

13. In paragraph 5 of its particulars of claim the Plaintiff alleged, when it instituted the action against the Defendant in 2013, that it complied with all its obligations in terms of the sale agreement, alternatively that it substantially complied with all its obligations in terms of the sale agreement.

    See: ***Amended particulars,*** par.5

14. In claim 1 of its claim the Plaintiff claims from the Defendant the balance of the purchase price. The Plaintiff alleges that as at 31 January 2013 the balance of the purchase price, together with capitalised interest, amounted to R79 601 756.00.

15. The first claim consists of 2 parts. The first part is for the balance of the purchase price, as stated above. The second part is for a penalty. In this regard the Plaintiff relies upon paragraph 2.2.5.1 of the sale agreement which states that should payment of the balance of the purchase price not be made as was agreed and contemplated in paragraph 2.2.2 of the agreement (i.e. R50 million payable not later than 30 months after registration of transfer) then in terms of clause 2.2.5.1 a penalty of 20% of the amount outstanding shall become due and payable. In this regard the Plaintiff claims a penalty of R14 328 479.00 from the Defendant.

    See: ***Amended particulars,*** par.9

16. In claim 2 the Plaintiff claims payment to it of the clearance costs it alleges to have paid on behalf of the Defendant. In this regard the Plaintiff relies upon paragraph '3 of the sale agreement which stipulates that any amounts advanced by the Plaintiff to pay for transfer and clearance costs shall be repaid by the Defendant to the Plaintiff within 90 days from date of registration of transfer.

    See: ***Sale agreement, trial bundle,*** par.3, p.6

17. Claim 3 relates to the Plaintiff's alleged entitlement to monies payable by the Gauteng Provincial Government : Department of Roads and Transport, in respect of the expropriation of a portion of the property. The Plaintiff alleged that the parties concluded an oral agreement on 2 March 2010 and that the Defendant agreed then to pay to the Plaintiff an amount of R3 767 158.00, which represents a partial compensation which the Department paid for the expropriation of the portion of the property.

18. After the Plaintiff instituted its action against the Defendant it applied for summary judgment. The Defendant filed an opposing affidavit and *inter a/ia,* raised as a defence the issue that the Plaintiff has in fact not complied with its

contractual obligations and had failed and still fails, to provide to the Defendant vacant occupation.

19. In addition, the Defendant also raised in its affidavit resisting summary judgment the issue that the Defendant had failed to refer to, or to attach to its particulars of claim, the indemnity and the undertaking which the Plaintiff gave to the Defendant upon date of transfer.
20. After an opposed argument leave to defend was granted to the Defendant.
21. In its plea the Defendant refers to the indemnity and undertaking and alleged that the said indemnity and undertaking forms an essential part of the agreement between the parties, and should therefore be read with the sale agreement and the other addendum, namely annexures "POC2" and "POC3" attached to the Plaintiff's particulars of claim.
22. Regarding claim 1 the Defendant disputes liability for the penalty, and contends that upon a proper interpretation of the sale agreement the penalty would only be payable if the Defendant requested the Plaintiff, not later than 60 days before the expiry of the 30 month period mentioned in paragraph 2.2.2 for an extension of a further 6 months for payment of the balance purchase price. The Defendant pleaded that it never had asked the Plaintiff for an extension and that consequently the penalty provision contained in paragraph 2.2.5.1 does not apply. In the alternative the Defendant pleaded that should the court arrive upon the conclusion that the Plaintiff is entitled to rely upon the penalty provision, then it ought not to be enforced by virtue of a discretion afforded to the court not to enforce a penalty provision in a contract, which discretion a court derives from the provisions of the conventional Penalties Act, 15 of 1962. In this regard the Defendant requested that the court should reduce any such a penalty to an amount which the court may deem appropriate in the prevailing circumstances.
23. The Defendant's main defence on the Plaintiff's first claim is that the Plaintiff did not comply with paragraph 4 of the sale agreement, the Defendant also breached annexure "A", and also breached the undertaking which was recorded in the letter dated 4 May 2009, annexure "A1" to the plea.
24. The Defendant pleaded that initially it did not want to allow registration of the property to take place due to the fact that it could not get or receive vacant occupation as promised in paragraph 4 of the sale agreement on the date of registration of transfer, due to the presence of squatters on the property.

Annexure "A", so alleged the Defendant, was then concluded between the parties on 7 May 2009, before registration of transfer.

25. The Defendant alleged that the Plaintiff is premature with its action, and that the Defendant is only obliged to pay the remainder of the purchase price to the Plaintiff after the Plaintiff first complied with its undertaking to give vacant occupation and its undertakings recorded in the indemnity and undertaking. Therefore, the Defendant pleads that its obligation to pay the remainder of the purchase price is reciprocal to the Plaintiff's obligations and that until sue a time as the Plaintiff had complied with its obligations there is no obligation on the Defendant to pay the remainder of the purchase price.
26. With reference to claim 2 the Defendant repeats its defence that the Plaintiff is premature in instituting its action. The Defendant also, in addition, alleges that the Plaintiff received various amounts of R77 273.00 each from 1 October 2010. In this regard the Defendant relies upon set-off.

    See: ***Plea,*** par.20.2
27. In response to claim 3 the Defendant repeated its defence that the Plaintiff is not entitled to payment, due to the Plaintiff's non-compliance with its own contractual obligations. In addition the Defendant contends that any obligation to refund the Plaintiff is an obligation that arises only if the Defendant is in a position to do so, and in this regard the Defendant refers to the fact that annexure "POC8" provides that the Defendant will only refund the Plaintiff *"as soon as you are in* a *position to do so".* The Defendant then continues to allege that it is not in a position to do so, because it suffered and is still suffering significant damages as a result of the breach by the Plaintiff of the terms of the agreement.
28. In the Defendant's counterclaim it claims damages from the Plaintiff in an amount of R300 000 000.00. In this regard the Defendant alleges that it paid the Plaintiff an amount of R43 000 000.00 as at the date of transfer, but as a result of the breach on the part of the Plaintiff to provide to the Defendant vacant occupation, the failure on the part of the Plaintiff to honour its indemnity and undertaking, and furthermore as a result of fraudulent misrepresentations made by the Plaintiff to the Defendant, to the effect that it will procure an ejectment of the occupiers from the property, the Defendant suffered significant damages.

    See: ***Counterclaim,*** par.11
29. The Defendant alleges that if vacant occupation was provided to it the value of

the property would have been R300 000 000.00. The Defendant alleges that with the squatters on the property, the property is completely valueless.

30. The Plaintiff filed a replication, and later an adjusted replication. In the adjusted replication the Plaintiff alleged that annexure "A" varied clause 4 of the sale agreement and, instead of having an obligation to give to the Defendant vacant occupation, the only obligation that remained with the Plaintiff was that, by no later than 31 August 2009, the Plaintiff had to take all steps and to do and procure the doing of all that was required in order to lawfully evict all squatters from the property, which duty the Plaintiff alleged it complied with.

    See: ***Adjusted replication,*** par.3.2, p.120

31. In the alternative the Plaintiff alleges that should the Court find in favour of the Defendant, namely that the Defendant was entitled to withhold payment until the Plaintiff had caused the eviction of the squatters, then the Plaintiff alleges that a fair and reasonable cost for the Defendant to achieve a vacation of the property by the squatters would not exceed an amount of R6 million, and the Plaintiff then continues to allege that it is consequently entitled to a reduced purchased price.

    See: ***Adjusted replication,*** par.3.8, p.121 - 124

32. In the result, in the replication, the Plaintiff persists with its claims in the main, but also alleges in the alternative that it ought to be granted the relief prayed for, but with a reduction of the purchase price by an amount of R6 million.

    See: ***Adjusted replication,*** p.125

B. THE TRIAL

33. Three witnesses gave evidence, namely:
    - 33.1. On behalf of the Plaintiff:
    - 33.1.1. Mr Grant Collin Fraser, an expert;
    - 33.1.2. Mr Jacobus Gustavus Pansegrouw, the Plaintiff's representative.

34. Mr Grant Fraser testified that he would subtract an amount of between R3 million and R6 million, which, according to him is the sum with which the presence of the squatters diminishes the value of the property. He concluded that he would value the property at slightly more than R180 million. He also accept that the presence of the occupiers diminishes the value of the property.

35. In a joint minute, prepared by the two experts, they concluded that the informal

settlers reportedly number about 40 people and occupy about 20 structures.

36. The crux of the evidence presented was that the parties' experts agreed that the portion of the property on which the squatters were located was no more than R6,000,000.00 (Six million rand). No evidence was tendered comparing values of the property with or without the squatters.
37. It was submitted by counsel for the Defendant that Mr Pansegrouw initially limited the Plaintiff's obligation under the undertaking to institute the necessary litigation to ensure that the squatters could be lawfully evicted and subsequently that the Plaintiff indeed had the obligation to see such process through.
38. I must agree with- counsel for the Plaintiff that the criticism is unfounded by virtue of the fact that when the cross-examination was originally directed to the witness in this respect. It was limited to what the Plaintiff was obliged to do in terms of the undertaking in August 2009.
39. The Defendant's counsel never previously asked the question whether the Plaintiff was obliged to ultimately evict the squatters, the question related only to what had to be done by August 2009.
40. The second criticism related to the suggestion that Mr Pansegrouw had testified that there were documents where the Defendant had conceded the obligation to make payment of Claim 3, where the witness in fact testified that the concession of the Defendant was made during meetings that were held after the Defendant's initial denial of its liability therefor.
41. The witness did not initially answer that there were documents wherein the Defendant had conceded liability, but when asked by the Defendant's counsel "show me documents" that is when the witness for the first time tendered and subsequently referred to D108 and D109.
42. In my view the witness was a reliable witness. He did not contradict himself on any material aspect and there are no inherent improbabilities in his evidence.
43. The majority of the questions for determination are ultimately to be decided on the interpretation of the Sale Agreement and Indemnity and Undertaking.

C. THE INTERPRETATION OF THE CONTRACTS

44. In **Coopers & Lvbrand and Others v Brvant**[1] Joubert JA set out the legal position in the interpretation of contracts as follows:

> *"According to the golden rule of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in* some *absurdity, or* some *repugnancy or inconsistency with the* rest *of the instrument."*

45. The mode of construction should never be to interpret the particular word or phrase in isolation.

See: ***Swart and Another v Cape Fabrix*** *(PtvJ* ***Ltd***[2]

46. In ***Sassoon Confinning and Acceptance Co*** *(PtvJ* ***Ltd v Barclays National Bank Ltd***[3] it was pointed out by Jansen JA at 6468-D:

> *"The first step in construing* a *contract is to determine the ordinary grammatical meaning of the words used by the parties. Very few words, however, bear* a *single meaning, and the ordinary meaning of words appearing in* a *contract will necessarily depend upon the context in which they are used, their interrelation, and the nature of the transaction* as *it appears from the entire contract. It may, for example, be quite plain from reading the contract* as a *whole that* a *certain word or words are not used in their popular everyday meaning, but are employed in* a *somewhat exceptional, or even technical sense. The meaning of* a *contract is, therefore, not necessarily determined by merely taking each individual word and applying it to one of its ordinary meanings."*

D. THE FACTUAL MATRIX OF THE SALE AGREEMENT

47. The Sale Agreement constitutes a contract whereby:
    - 47.1. the sale of an immovable property;
    - 47.2. of significant size;
    - 47.3. for a significant amount of money;
    - 47.4. for the purpose of developing the property;
    - 47.5. whereby parts of the purchase consideration has been deferred to

[1] 1995 (3) SA 761 (A) at 767E -768E
[2] 1979 (l) SA 195 (A) at 200E -201A, 201B & 202C
[3] 1974 (I) SA 641 (A)

the happening of specific occurrences and dates;

47.6. the seller would assist the purchaser to comply with its payment obligations by:

47.6.1. effectively lending money for the payment of the transfer costs;

47.6.2. allowing the purchaser to request for a further 6 month deferment of the payment of the deferred purchase price under certain circumstances;

47.6.3. motivating to pay the deferred purchase price timeously and penalising the purchaser in the event of its default;

47.6.4. monthly meetings would be held between the seller and purchaser whereby the purchaser would provide the seller with details of the sales development costs, status of township development and other relevant information that may be requested by the seller.

48. I am of the view!hat the ordinary meaning of the words in context remain the same and the factual matrix is established as the sale of a large immovable property for purpose of development. The Sale Agreement was intended to be the sole record of the agreement between the parties, as amended by the Indemnity and Undertaking. There is nothing in the Sale Agreement that is ambiguous.

49. Clause 4 of the Sale Agreement provided as follows:

> *"Possession shall be given by the Seller on the date of the transfer, together with vacant occupation, from which date the Purchaser shall be entitled to all benefits from and be liable to all risks of ownership in respect of the property including liability for rates and taxes and any other charges or levies on the property from such date."*

50. On the date of registration (7 May 2009), the parties concluded the Indemnity and Undertaking which forms part of the Sale Agreement.

51. The Undertaking provided as follows:

> *'We the undersigned, Lindley Farm 528 (Propriety) Limited ("Lindley Part<* 528'J *hereby agree and undertake in favour of Cradle City (Propriety) Limited ("Cradle* City'J *by no later than 31 August 2009 at our* costs, *to take all such steps and to do and procure the doing of all that is requisite in order to lawfully evict all squatters, including but not limited to all on the list attached hereto marl<ed* as *Appendix 1, occupying the Remaining*

Extent of Portion 13 of the Farm Lindley No 528 Registration JQ, the Province of Gauteng, measuring 90.2408 (ninety point two four zero eight) hectares (the "Land'J as *at the date upon which the Land is transferred into the name of Cradle City in the relevant Deeds Office (the "Squatters'J."*

52. Upon comparing clause 4 and the Undertaking, it is clear that:
    52.1. vacant occupation was still the ultimate purpose - this was not changed by the undertaking;
    52.2. irrespective of what was required to be done, be it the provision of vacant occupation or to take steps to obtain vacant occupation, it is clear that it was no longer to occur at date of registration, but by 31 August 2009.
53. Had the Plaintiff undertaken to lawfully evict the squatters by 31 August 2009, there would have been no need to insert the phrase *"to take all such steps and to do and procure the doing of all that is requisite in order to lawfully evict all squatters".*
54. The Sale Agreement was not cancelled. The inescapable conclusion is that the parties did not intend that the Plaintiff evict the squatters by 31 August 2009, but rather takes steps to do so.
55. Counsel for Plaintiff submitted that the preceding negotiations and agreements between the parties were clear stipulations that the Property would nevertheless be developed (with the Plaintiff being paid after certain amount of sales in the development had been achieved). Thus, eviction of the squatters, be it on date of registration, or by 31 August 2009, was clearly not of crucial importance to ensure that the purpose of the Sale Agreement was achieved. I must agree with the submission.
56. The Defendant did not plead nor did the Defendant tender any such evidence that the presence of the squatters hindered development of the property.
57. It is also common cause between the parties' experts that the property could be developed by excluding the portion occupied by the squatters.
58. I came to the conclusion that the Indemnity and Undertaking had amended clause 4 of the Sale Agreement and that the Plaintiff was only obliged by no later than 31 August 2009, to take all steps and to do and procure the doing of all that is requisite in order to lawfully evict all squatters.

59. The second part of claim 1 is for a penalty. In this regard the Plaintiff relies upon paragraph 2.2.5.1 of the Sale Agreement. In this regard the Plaintiff claims a penalty of R14,328,478.00 from the Defendant.
60. The Defendant suggests that the third part of clause 2.2.2 means that:
    60.1. absent a request by the Defendant for an extension in terms of the second part of clause 2.2.2;
    60.2. that is, a request to pay the purchase price six months after the expiration of the period of 30 months after the registration of transfer of the property in the Defendant's name as envisaged in terms of the first part of clause 2.2.2.

    Then, in that event, the penalty provision contained in 2.2.5 does not find application.
61. The Defendant's contention is based on the ordinary meaning of the third part of clause 2.2.2 without consideration of the ordinary meaning in clause 2.2.5. The ordinary meaning and context principles must be applied side by side.
62. In my view it was the probable intention that payment would occur on the due date, which were explained by the parenthesis to be 30 months after registration.
63. The extrinsic evidence principle does not require employment as clauses 2.2.2 and 2.2.5 are not ambiguous. In my view the penalty provision finds application and that the Defendant is liable therefor.

E. THE RECIPROCITY QUESTION

64. The right to refuse performance is consequently a method to enforce counter performance, as long as counter performance is still possible and the contract not cancelled.
65. The Defendant suggests that its payment obligation of the deferred purchase price was conditional upon the Plaintiff providing it with vacant occupation on date of registration of transfer (7 May 2009) of by no later than 31 August 2009.
66. There is nothing in the Sale Agreement or the Indemnity and Undertaking to suggest that payment of the deferred purchase price was conditional upon the Plaintiff providing vacant occupation to the Defendant There are no *"on condition that"* or *"subject to"* phrases indicative of any conditional relationship between vacant occupation and payment of the deferred purchase price.

67. In the premises, I concluded that there is no reciprocity between the bilateral obligations of the parties.
68. As reciprocity falls away, so too does:
    69.1. the amendment question;
    69.2. the price reduction question; and
    69.3. the eviction question.

F. CLAIM 1 (QUANTUM QUESTION)

69.
    70.1. It is common cause that the Defendant did not pay the outstanding purchase price, apart from payments totalling R1, 159,095.00.
    70.2. The penalty amount was confirmed by Mr Pansegrouw to be correct and the Defendant did not dispute this fact.

G. CLAIM 2 (QUANTUM QUESTION)

70.
    71.1. Mr Pansegrouw confirmed that the Defendant did not pay the Plaintiff the transfer costs on 7 August 2009, it being common cause that the amount was only paid on 21 October 2010. Mr Pansegrouw also confirmed the interest calculation of R256,640.00 as correct.
71. The Plaintiff conceded that the penalty clause constitutes a penalty for purposes of the Conventional Penalties Act. No facts have been pleaded and no evidence produced as to why the penalty should be reduced or by how much. Accordingly the Defendant failed to discharge the onus resting upon it.

H. THE FINANCIAL ABILITY QUESTION

72.
    73.1. The Defendant pleaded that it was not in a position to pay the partial compensation because it suffered damages as a result of the Plaintiff's breach of the Sale Agreement.
    73.2. The Defendant did not tender any evidence in support of the

pleaded version. The Defendant refused to discover its relevant financial statements, despite the Plaintiffs requests therefor. In my view the Defendant has failed to discharge the onus resting upon it in this respect.

THE SET-OFF QUESTION

73.

74.1. The Defendant contends that, as the outstanding purchase price would become due on the earliest 30 months after date of registration of transfer, any payments made by the Defendant to the Plaintiff prior thereto were not due thus should be set-off against Claim 2 which was due on 1 October 2010.

74.2. As the Defendant was indebted to the Plaintiff for more than one bebt, set off does not necessarily apply where the parties intended the payment of a specific debt as opposed to the other.

74.3. The amount of R1,159,095.00 was significantly in excess of any interest claim on the transfer costs and was clearly intended and agreed to be allocated towards the outstanding purchase price. The Defendant did not stipulate it as a payment of the interest forming the subject of Claim 2 nor has the Defendant proven that the appropriation of the Plaintiff to Claim 1 was not valid or equitable. The Defendant also did not seek to suggest that the payment from the Department was to be set off against Claim 2. Set-off Claim 2 therefore did not occur.

J. THE INDEMNIFICATION QUESTION

74.

75.1. Claim 3 relates to the Plaintiffs alleges entitlement to monies payable by the Gauteng Government, in respect of the expropriation of a portion of the property.

75.2. The Defendant contends that it is indemnified by the Plaintiff against the Plaintiffs Claim 3 as a result of the indemnity provided in the Indemnity and Undertaking.

75.3. When regard is had to what obligation of the Plaintiff flows from

indemnifying the Defendant - namely to effect payment to settle claims against the Defendant, that the indemnity relates to patrimonial or contingent patrimonial diminishment that the Defendant might suffer.

75.4. It cannot be said that Claim 3 for the partial compensation, which would form part of the outstanding purchase price for which a bond was registered over the expropriated property arose as a result of any alleged breach of the undertaking or connected to Squatters whatsoever. It can hardly be said that the Plaintiff would protect the Defendant from a claim of the Plaintiff for an outstanding purchase price.

75.5. In my view the Plaintiff's claim do not fall under any of the grounds upon which the Defendant is entitled to indemnification.

75. The amendment question was answered in favour of the Plaintiff therefore there could be no breach by the Plaintiff.

L. THE COUNTERCLAIM BY THE DEFENDANT

76.

77.1. The Defendant claim damages from the Plaintiff in an amount of R 300,000,000.00. The Defendant alleges that it paid the Plaintiff an amount of R43,000,000.00 as at the date of transfer. As a result of the breach on the part of the Plaintiff to: 1) provide the Defendant vacant occupation, 2) failure on the part of the Plaintiff to honour its indemnity and undertaking, and 3) the fraudulent misrepresentations made by Plaintiff to the Defendant, that it will procure an ejectment of the occupiers from the property, the Defendant suffered significant damages.

77.2. The onus was on the Defendant to allege and prove fraud. It should be proved that the representation was false and that the Plaintiff knew it was false and the representation caused the Defendant to conclude the Sale Agreement and the Indemnity and Undertaking.

77.3. Mr Pansegrouw testified and denied that the Plaintiff is unable to get the squatters off the property. He did not consider it an impossibility and in fact testified that on a previous occasion the Plaintiff obtained a court order for eviction of the unlawful occupiers. The Land-Claims Court *rule nisi* had been discharged as a result of the local authority not having

any available accommodation for the squatters when the matter was finally heard in 2014. The Plaintiff is also attempting to acquire alternative accommodation for the squatters hat would be available.

77.4. The Defendant did not present any evidence that it had relied on the presentations in concluding the Sale Agreement.

77.5. No evidence was tendered by the Defendant that as a result of any breach or misrepresentation the Defendant could not develop the property or could not sell the property or the property was worth less that it would have been absent the breach or misrepresentation.

77. The innocent party is entitled to cancel an agreement, which had been concluded as a result of a misrepresentation. *In casu* the Sale Agreement has not been cancelled.

78. The Defendant did not prove its allegations that it should not have concluded the Sale Agreement and that at the date of the conclusion of the Sale Agreement what the market value of the property with no squatters present was, The Defendant was also required to provide evidence of what the company values of the property were.

79. The Plaintiff has in my view discharged the onus of proving its onuses and the Defendant failed to discharge the onuses resting upon it.

80. In the result the following Order is made:

1. The Defendant is ordered to to pay the Plaintiff:

1.1. Claim 1: R75,834,598.00 together with VAT thereon.

1.2. Claim 2: R14,328,479.00 together with VAT thereon.

1.3. Claim 3: R258,640.00.

1.4. Interest on the amounts of:

1.4.1. R75,834,598.00 at prime calculated monthly in arrears and compounded from 31 January 2013 until date of final payment.

1.4.2. R14,328,479.00 at 15.5% per annum a *tempore* morae.

1.4.3. R258,640.00 at 15.5% per annum a *tempore* morae.

1.4.4. Costs of suit, including costs of two counsel.

1.4.5. The Defendant's counterclaim is dismissed with costs, including costs of two counsel.

JJ STRIJDOM

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON:

DELIVERED ON:

APPEARANCES:

Counsel for Plaintiff:	Adv HB Marais SC
	Adv HP van Nieuwenhuizen
Attorneys for Plaintiff:	Barnards Incorporated
	Barnard & Patel Incorporated
Counsel for Defendant:	Adv MP van der Merwe SC
Attorneys for Defendant:	Saunders Venter Van der Walt Attorneys