

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE No: 2577/1999

In the matter of

NEW ADVENTURE INVESTMENTS 193 (PTY) LTD

Plaintiff

and

THE TRUSTEES FOR THE TIME BEING OF

THE SAS TRUST

Defendant

JUDGMENT DELIVERED : 22 APRIL 2002

MOOSA, J:

INTRODUCTION:

1. Plaintiff instituted action against defendant for cancellation of a deed of sale concluded on 5 November 1998 (*“the contract”*) in terms of which defendant sold to plaintiff certain immovable property known as 241 Ocean View Drive, Sea

Point (*"the property"*). The purchase price of the property was R2 615 000 of which plaintiff paid defendant a deposit of R265 000. In addition to the deposit plaintiff paid the sum of R7 192,62 in respect of rates and taxes for the property. The cancellation is based on fraudulent misrepresentation in that defendant intentionally withheld certain material information in order to induce plaintiff to conclude the contract. Derek Lubner (*"Mr Lubner"*) represented plaintiff and Shaun Stevenson (*"Mr Stevenson"*) represented defendant.

THE PLEADINGS:

2. Plaintiff averred in the summons that the property had outstanding views of the Atlantic Ocean and the Atlantic coastline. It averred further that prior to the conclusion of the contract, defendant (in the person of Mr Stevenson) was aware that:
 - (a) the said views enjoyed from the property would be of great importance to a would-be purchaser of that property and to plaintiff in particular;
 - b) the owner of a property to the front and across the road from the property, (the front property) intended to construct a multi storey block of flats on such property in the very near future and was applying for departure from the zoning regulations;
 - c) such block of flats would seriously interfere with and obstruct the aforesaid view from the property;
 - d) a would-be purchaser of the property, and plaintiff in particular, would in all probability not know of the said intention to build the block of flats or of the application for departure from the zoning regulations.

3. Plaintiff alleged that defendant was under a duty to disclose to it the information that the said owner intended to build such block of flats and was applying for departure from the zoning regulations (application for the proposed development) prior to concluding the contract. But for the non-disclosure, defendant would not have concluded the contract.

4. Defendant admitted in the plea that the property possesses good views of the Atlantic Ocean and Atlantic coastline. Defendant further admitted paragraph 2(a) above and made the following qualified admissions in respect of paragraphs 2(b) and 2(c) above:
 - a) as at the date of conclusion of the contract, Mr Stevenson was aware that the owner of the front property was investigating the possibility of a development of such property and
 - b) depending on the extent of such development, which would be limited by the relevant zoning regulations, the view from the property could be interfered with and obstructed to a limited extent.

Defendant denied paragraph 2(d) above. Defendant also denied that he was under a duty to make a disclosure concerning the proposed development.

5. Defendant counterclaimed cancellation of the contract on the ground of breach of contract on the part of plaintiff. Alternatively, defendant averred that the purported cancellation of the contract by plaintiff amounted to a repudiation which it accepted by reason of plaintiff's alleged breach of contract. In consequence

thereof defendant alleged that it suffered damages in the sum of R537 465. After setting off the deposit paid by plaintiff amounting to R265 000, the defendant counterclaimed the balance of R272 465.

THE ISSUES:

6. The issue which the court has to determine in the first leg of its inquiry is whether or not there was a legal duty on defendant to disclose to plaintiff that an application for the proposed development was lodged and whether or not the non-disclosure thereof constituted fraudulent misrepresentation. If the court finds for plaintiff, it follows that defendant's counterclaim would fail. On the other hand, if the court finds for defendant, the second leg of inquiry would be to determine whether or not plaintiff committed a breach of contract and/or repudiated the contract and whether or not plaintiff is liable to defendant for damages as claimed.

THE FACTS:

7. On 5 November 1998 plaintiff and defendant concluded the contract in terms of which plaintiff purchased from defendant the property for the purchase price of R2 615 000. Plaintiff paid a deposit of R265 000 and the balance was to be paid against registration of transfer. In terms of the contract, the deposit was to be held in an interest bearing trust account. Although the contract provided for possession and vacant occupation to be given on date of registration of transfer, it was common cause that plaintiff was given possession and vacant occupation of the property on 7 December 1998. Transfer of the property was expected to

take place on 8 December 1998.

8. On 7 December 1998, while plaintiff was in the process of taking occupation of the property, Mr Lubner was approached by Mr J B Evans, a neighbour and informed of the application for the proposed development. Mr Lubner, after making certain preliminary inquiries, instructed plaintiff's attorneys to delay the transfer of the property while he investigated the matter further. On the same day plaintiff's attorneys addressed a letter to defendant's attorneys alerting it to the application for the proposed development and requesting that the transfer be delayed pending further investigation. The same afternoon Mr Stevenson confronted Mr Lubner on the property about delaying the transfer. When informed about the application for the proposed development, Mr Stevenson replied that he had only received notification of the said application from the City Council earlier that day.
9. The letter, addressed by plaintiff's attorneys to defendant's attorneys to which I referred earlier, amongst other, states that Mr Stevenson was aware of the application for the proposed development and had failed to disclose the information to the plaintiff prior to the conclusion of the contract. It states further that, had plaintiff been made aware of the information it would not have submitted an offer to purchase the property. Defendant's attorneys responded to this letter on 8 December 1998 by confirming that the application was lodged. They put plaintiff to terms to take transfer of the property, failing which, defendant would exercise its rights in terms of clause 14 of the contract. On 21 December 1998, plaintiff cancelled the contract on the basis of fraudulent misrepresentation

arising from the non-disclosure of a material fact. On 23 December 1998 defendant in turn cancelled the contract for breach thereof or alternatively accepted the repudiation and held plaintiff liable for damages.

10. It is common cause that an application for the proposed development was submitted to the Cape Town City Council. The application required departure from certain sections of the building regulations. Revised plans were subsequently submitted and new departures were sought from the building regulations. The Director of Land Management of the City Council, in his report dated 26 April 1999, recommended to the planning committee that the application for the proposed development be refused. The application was subsequently withdrawn. It is further common cause that during October 1998 Mr Stevenson received a telephone call from Thomas Brummer (*"Mr Brummer"*) informing him of the application for the proposed development. This information was not conveyed to plaintiff by defendant during the course of negotiations for the sale of the property. This information was also not brought to the notice of Mrs Jacqueline Rosenberg, (*"Ms Rosenberg"*) the estate agent who negotiated the deal between plaintiff and defendant. It is also common cause that the property lies on the slopes of Signal Hill, immediately above Ocean View Drive and has a panoramic view of the Atlantic Ocean and the Atlantic coastline. The front property which comprises a single storey dwelling, is zoned R4 in terms of the building regulations. This allows for the development of a block of flats up to seven storeys high, subject to certain building restrictions.

THE EVIDENCE:

11. I do not intend to summarise the evidence in full as most of it is either common cause or not disputed. As the issues, which are not common cause, have to be determined on the basis of credibility, I will refer to the evidence of the various witnesses insofar as it may be necessary in that regard. For plaintiff, Mr Lubner, Janet Lubner, Mr Brummer and Jonathan Smiedt testified. For defendant, Ms Rosenberg and Mr Stevenson testified. Save for the evidence of Mr Lubner and Mr Brummer, Mr **Louw**, for defendant, did not seriously challenge the evidence of the other witnesses for plaintiff. Save for the evidence of Mr Stevenson, Mr **Engers**, for plaintiff, did not seriously challenge the evidence of the other witness for defendant. Before dealing with the testimony of Mr Lubner and Mr Stevenson, I will briefly refer to the evidence of the other witnesses.

Janet Lubner:

12. She described the events which eventually led to the purchase of the property. She confirmed that the property had a magnificent view of Sea Point, the beachfront and the Atlantic seaboard. The property appealed to them because it had ample accommodation, a swimming pool, a garden and a good sea view. On the morning of 7 December, while she and her husband were supervising the unpacking of their furniture and effects, they were approached by a neighbour, who she thinks is Mr Evans. He asked them what they thought of the proposed construction of a seven storey building directly in front of the property. She was shocked by this information. It was the first time she had heard of such development proposal.

13. The late afternoon of the same day Mr Stevenson arrived at the property. He was in a furious mood and wanted to know from her husband why he is delaying the transfer. He said it was his house and they should get out. He said that he had only read about the proposed development in the letters that were found in the post box that day. Mrs Lubner could not recall a statement by Mr Stevenson to the effect that *"he would refund the deposit"*. However, in her written statement which was handed in as part of the record, she states *"he offered to refund our money and take back the house..."*. Mr Lubner in his evidence specifically stated that Mr Stevenson offered to refund the deposit. Mr Stevenson, on the other hand, denies this allegation in his evidence.

14. Mrs Lubner made a good impression on the court. She came across as an honest and credible witness. She gave her evidence in a clear and forthright manner. Her evidence in chief was not seriously challenged under cross-examination. Her omission with regard to the repayment of the deposit, can be ascribed to an innocent oversight and not a deliberate falsehood. The court has no hesitation in accepting her evidence.

Thomas Brummer:

15. He is a qualified Town and Regional Planner. He was commissioned by the developer of the front property to attend to certain aspects of the proposed development thereon. During October 1998, he telephoned Mr Stevenson and informed him that the owners intended to develop the front property. The building could either be a five or a seven storey building which would involve departures from

the zoning regulations. He said he wanted to take photographs from the property and prepare a photo montage superimposing the outlines of the various development alternatives in order to gauge the effect and impact of a five or seven storey building on the view from the property. He suggested that they meet in order to discuss the development proposals.

16. Mr Stevenson informed him that he would oppose the proposed development. Mr Stevenson thereupon informed him that he had received an offer for the purchase of the property earlier that year and that he should have sold the property. He inquired from Mr Brummer whether there was now a duty upon him to disclose the information of the proposed development to a prospective purchaser of the property. Mr Brummer responded in the affirmative and Mr Stevenson agreed therewith. Mr Brummer tried to set up an appointment with Mr Stevenson to discuss the application with him personally and to take photographs from the property. Mr Stevenson told him that he would be out of town for a week and he should telephone on his return for an appointment. Mr Brummer made various calls to him and left messages, but Mr Stevenson failed to respond.

17. Mr Brummer was an independent and impartial witness and had no interest in the outcome of the action. He impressed the court as an honest, unbiased and reliable witness. Mr **Louw** attempted to discredit his testimony under cross-examination because he had not made contemporaneous notes of the conversation which occurred three years earlier. Mr Brummer was adamant that his testimony was true and correct. The court has no reason not to accept his testimony.

Jonathan Smiedt:

18. He is a sworn appraiser and auctioneer and has extensive expertise in the selling of immovable property. He testified that the property had a panoramic sea view. It had an unimpeded and uninterrupted view of the whole of Table Bay and its shoreline. This was an important quality that enhanced the value of the property. It would constitute a material consideration to any potential purchaser in formulating an offer to purchase the property. A property with an unrestricted sea view would be worth more than the same property with a restricted sea view.

19. Under cross-examination, Mr Smiedt made a number of concessions. He conceded that a panoramic view was available to someone standing on the balcony even were he to look in the line of the blocks of flats on either side of the front property. He also conceded that the same situation would prevail in the event of a similar development being erected on the front property. He also made certain concessions with regard to propositions made relating to the marketability and value of the property. He was asked whether the presence of a block of flats on either side of the front property would alert one to the possibility of development of the front property. He replied that the front property had been there without change, for a very long time, in his estimate for about 40 years. In his opinion there was no reason to alert anyone to the possibility of an imminent development.

20. Mr Smiedt was an independent and impartial witness. Although called by the

plaintiff, he made a number of concessions in favour of defendant. His credibility was reinforced rather than weakened under cross-examination. He had no personal interest in the outcome of the trial. His evidence is accepted without reservation.

Jacqueline Rosenberg:

21. She is the estate agent that was the effective cause of the sale of the property. She had 14 years experience in the estate agency business. She concentrated on the Fresnay and Bantry Bay area. She described the events which finally led to the conclusion of the deed of sale. She testified that she recalls telling the Lubners on two occasions when they inquired about the possible development of the front property, that there exists a possibility of the property being developed. The first time it was discussed with Mr Lubner and on the second occasion, it was discussed in the presence of the father. She, however, was not aware of any such development. She said that estate agents are usually informed and are aware of any developments which take place in the area. She, however, pointed out to the Lubners the developments taking place on the neighbouring properties.

22. She further informed Mr Lubner that should he be concerned about the possibility of a development on the front property, he was at liberty to make enquiries at the City Council. She also volunteered to accompany him to the City Council to make such inquiries. Under cross-examination she acknowledged that she did not know of an application for the proposed development. Mr Stevenson did not tell her of such application. She testified that if she was aware of such application, she would be ethically obliged to inform the Lubners. It was a material consideration for any

prospective purchaser. She conceded that any development on the front property had the potential of obstructing the view of the property. She conceded that a great deal of value was attached to the view of the property. She agreed that the view of a property was important to the Lubners.

23. The only material aspect in which her evidence conflicts with that of Mr Lubner is her statement that if they wanted to be certain about possible development on the front property, he could make inquiries at the City Council and that she was prepared to accompany them. There is no reason to disbelieve her on this aspect of the evidence. Although Mr Lubner disputed this evidence, he conceded under cross-examination that she could have said so. Although she had a direct financial interest in the outcome of the trial, she made many concessions in favour of the plaintiff. She gave her evidence in a clear, truthful and unbiased manner. Mr **Engers** had no serious criticism of her evidence. Her evidence is accordingly accepted.

Derek Lubner:

24. He is a director of plaintiff company. He described the events leading up to the purchase of the property. He testified that they were looking to purchase a property on the Atlantic seaboard with a magnificent sea view. Ms Rosenberg introduced them to the property which appealed to them. On 7 December 1998, the date on which they took possession of the property, and while supervising the unpacking of their furniture and effects, a neighbour approached them. He asked them what they thought of the proposed construction of a seven storey building on the front property. He showed them a letter from the City Council about the proposed development. He

was shocked by this information.

25. He contacted the Cape Town City Council whose official put him in touch with Mr Brummer. During a telephonic conversation with Mr Brummer, he was informed that Mr Brummer had discussed the proposed development with Mr Stevenson. It appeared to him that the proposed development would have a serious impact on the sea view of the property. He immediately instructed his attorney to delay the transfer pending further investigation. Mr Stevenson arrived at the property in the late afternoon of 7 December 1998. He was angry and wanted to know why they were delaying the transfer. He shouted and said they must get out of his house. He will refund the deposit. He said he did not know of the proposed development. He had only received the letters from the City Council in his post box that day. He (Mr Lubner) subsequently gave instructions to his attorneys to cancel the contract. He stated that if he had been informed by Mr Stevenson of the proposed development, he would not have concluded the contract.

26. Under cross-examination he was asked whether it ever crossed his mind that the front property might be developed. He replied in the negative. His attention was drawn to paragraph 13 of his written statement and the fact that Ms Rosenberg would be called to give evidence. He then agreed that he could not dispute that the matter had in fact crossed his mind. He admitted that there was a general discussion around the possible development of the front property, but added: *"The way my view was, the possibility that lightning can strike a house and it will blow up"*. He could not satisfactorily explain why he made such remark, but conceded that it

was made off the top of his head.

27. He was not an easy witness. He was irritable, argumentative and impatient at times.

He made many uncalled for remarks. The comment concerning *"lightning striking a house and blowing up"* was unfortunate, but in my view nothing revolves around it.

Mr **Louw** tried to blow the remark out of all proportion. I accept Mr Lubner's explanation that it was made off the top of his head. It was in keeping with the many other thoughtless remarks made by him. Mr **Louw** conceded that despite his behaviour and attitude in the witness box, it does not reflect upon his credibility, because it stems from a misguided arrogance and belief of self-worthiness. I agree with that assessment of the witness. In any event, most of his evidence was either common cause or corroborated by the other witnesses whose evidence was credible and reliable. His evidence is therefore accepted.

Shaun Stevenson:

28. He was one of the trustees of defendant. He described himself as a businessman and property developer. He testified that he was not engaged in direct negotiations with the Lubners. The negotiations were conducted between defendant's attorney, plaintiff's attorney, its accountant and Ms Rosenberg. He admitted receiving a telephone call from Mr Brummer during or about the last week of October 1998. He was informed that Mr Brummer was investigating the possibility of a development on the front property. He informed him that until he (Stevenson) received a formal notification from the City Council about the proposals, he cannot consider it. He finally signed the contract on 5 November 1998.

29. During the first week of December 1998, he received notification from the City Council that the application for the proposed development was submitted. On 7 December 1998 he was informed by defendant's attorneys that the plaintiff sought to delay the transfer. He went to the property where he confronted Mr Lubner about delaying the transfer. Mr Lubner informed him about the proposed development. He said he (Stevenson) only received notification thereof from the City Council earlier on that day. He confirmed that the contract was subsequently cancelled.

30. Under cross-examination he admitted that he was concerned and upset about plaintiff delaying the transfer. However, he denies saying to the Lubners that it was his house, that they should get out and that he would repay the deposit. He could not recollect whether Mr Brummer had told him that the proposed development was to be between five and seven storeys high. After being prodded by Mr **Engers**, he conceded that Mr Brummer could have told him about the height of the building. He denied that he told Mr Brummer that he had previously received an offer for the property and that he should have accepted the offer. He also denied asking Mr Brummer whether he would be required to disclose the information of the possible development of the front property to a prospective purchaser of the property. He conceded that he had not communicated the information of the possible development on the front property to the Lubners. He denied any duty to disclose the information to the Lubners.

31. Mr Stevenson was a pathetic witness. He was evasive and his replies to questions under cross-examination were interspersed with answers like "*I cannot recall*". He

was not completely honest with the court. He could only recall matters which did not compromise his case, but those matters which were prejudicial to his case, he conveniently could not recall, or remember or simply denied them. In the view of the court his evidence which conflicts with that of the other witnesses, and particularly with that of Mr Brummer is suspect and unreliable and is accordingly rejected.

32. Because of the materiality of the telephonic conversation between Mr Brummer and Mr Stevenson it behoves this court to examine and analyse such evidence further. Mr Brummer was an independent and impartial witness. Mr Stevenson, on the other hand, had a direct interest in the outcome of the trial. Mr Brummer had no reason to lie, whereas Mr Stevenson had every reason to lie in order to bolster his case. He also had selective memory lapses. Such memory lapses occurred in respect of matters which were prejudicial to his case. The objective facts favour the version of Mr Brummer. Mr Brummer mentioned about a previous offer received by Mr Stevenson for the property. It is common cause that a previous offer was submitted by the Lubners. Surely Mr Brummer was unlikely to have known this. It is more probable that this information was communicated by Mr Stevenson to Mr Brummer during the telephonic discussion.

33. Mr **Louw** submitted that it sounds strange that Mr Stevenson, an experienced property developer and businessman, would ask a complete stranger's advice on a legal matter when he had regular access to an attorney. There is nothing strange in seeking such advice. Firstly, he gets it free of charge and secondly, he gets a further opinion on the matter. It does not happen infrequently in the affairs of people

that a second opinion is sought on a particular matter when the occasion arises. The credibility of Mr Brummer was beyond reproach, whereas the credibility of Mr Stevenson was impeached. The probabilities furthermore favour the version of Mr Brummer. The court accordingly has no hesitation in accepting the version of Mr Brummer with regard to the telephonic conversation and rejects the version of Mr Stevenson which is in conflict with that of Mr Brummer.

THE LAW:

34. Plaintiff's action is based on fraudulent misrepresentation. It is alleged that defendant intentionally withheld certain material information in order to induce the plaintiff to conclude the contract. Clause 11 of the contract stipulates that the purchaser will not be able to institute action against the seller for any defect in, or as a result of any representation by the seller or his agent in regard to the property. Fraudulent misrepresentation is excluded from protection by a clause of this nature on the grounds of public policy. To put it in another way, the guilty party cannot contract himself out of liability because of fraudulent misrepresentation. In **WELLS v SA ALUMENITE COMPANY** 1927 AD 69, the following dicta by **Innes, CJ** appears at page 72:

"On grounds of public policy the law will not recognise an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other. The Courts will not lend themselves to the enforcement of such a stipulation; for to do so would be to protect and encourage fraud."

35. It is settled law that fraudulent non-disclosure of a fact can give rise to the cancellation of a contract, if:

- a) such fact is material; (CHRISTIE on **THE LAW OF CONTRACT**, 4th edition at 324; **KARROO & EASTERN BOARD OF EXECUTORS & 413 TRUST CO v FARR & OTHERS** 1921 AD 413 at 415; **DUTCH REFORMED CHURCH COUNCIL v CROCKER** 1953 (4) SA 53 (C) at 61D; **OZINSKY NO v LLOYDD & OTHERS** 1992 (3) SA 396 (C) at 418E-F) and
- b) the withholding of the fact is intended to induce the innocent party to conclude the contract. (**BOWDITCH v PEEL AND MAGILL** 1921 AD 561 at 572; **WOODSTOCK, CLAREMONT, MOWBRAY AND RONDEBOSCH COUNCILS v SMITH** (1909) 26 SC 681 at 701; **DIBLEY & FIRTER** 1951 (4) SA 73 (C) at 88C-D; CHRISTIE on **THE LAW OF CONTRACT**, 4th edition at 328 and
- c) there is a legal duty to disclose such a fact; (LAWSA first reissue Vol 17 para 421 Fraudulent Misrepresentation; **DIBLEY v FURTER** (*supra*) at 87F-H; **FLAKS v SARNE & ANOTHER** 1959 (1) SA 222 (T) at 226D; **GERMIE MOTORS (PTY) LTD v ERICKSEN** 1985 (2) SA 389 (C) at 393F).

I will discuss each of the above elements in order to determine whether or not plaintiff is entitled to the relief claimed in this matter.

MATERIAL FACT:

36. A material fact is one going to the root of the contract. (**DUTCH REFORMED CHURCH COUNCIL v CROCKER** (*supra*) at 61D.) The question of materiality must be judged on the facts and circumstances of each particular case. A fact can be described as material if either disclosure of such fact or the non-disclosure thereof induces a party to enter into a contract. In the case of non-disclosure, the party would not have concluded the contract had that fact been made known.

37. In the context of this case the non-disclosure of the application for the proposed development must be germane to the sale of the property. Defendant admitted in the pleadings and its witnesses conceded, that the property, which formed the subject matter of the sale, enjoyed a magnificent view. This view would not only be of great importance to a would-be purchaser, but also to plaintiff in particular. The defendant further admitted that it was aware of the fact that the owner of the front property intended to construct a multi storey block of flats on such property and had applied for certain departures from the zoning regulations. It also conceded that such block of flats could seriously interfere with and obstruct the view from the property.

38. It is common cause that the property lies on the slopes of Signal Hill, above Ocean View Drive and has a panoramic view of the Atlantic Ocean and the Atlantic coastline. The front property is a single storey dwelling. The building regulations allow for the development of a block of flats up to seven storeys high subject to certain building restrictions. It was not disputed by defendant that plaintiff, through Mr and Mrs Lubner, had approached a number of estate agents with the object of purchasing a home with a view of the Atlantic coast. The property in question met their

requirements.

39. Mr Jonathan Smiedt, a sworn appraiser and auctioneer with extensive expertise in property, testified that the property had a panoramic sea view. It had an unimpeded and uninterrupted view of the whole of False Bay and its shoreline. The view was an important quality which advanced the value of the property. It would constitute a material consideration to any potential purchaser in formulating an offer to purchase the property.

40. Ms Rosenberg testified that she was not aware of the application for the proposed development prior to the conclusion of the contract. If she was aware of it, it would have been ethical for her to inform the Lubners thereof as it was a material consideration for any prospective purchaser. A great deal of value was attached to the view from the property and such view was important to the Lubners.

41. Mr Brummer, a town planner, was commissioned by the owner of the front property to attend to certain aspects concerning the proposed development of the front property. In and during October 1998, he informed Mr Stevenson, as the representative of the owner of a neighbouring property, of the proposed development. He said that the proposed development could either be a five or seven storey building which could involve departures from the zoning regulations. Such development could also impact on the unrestricted and unimpeded view from the property. It is common cause that this information was not given to the Lubners.

42. The importance of the view to plaintiff is not only confirmed by the evidence of the Lubners but reinforced by their conduct when informed by Mr Evans of the application for the proposed development. They were shocked. Mr Lubner immediately instituted inquiries. He put the transfer on hold and eventually cancelled the contract because of the potential threat to the panoramic view from the property.

43. In the light of the facts and circumstances, I am satisfied that the application for the proposed development was a material fact in the knowledge of defendant which it failed to disclose to plaintiff.

FRAUDULENT NON-DISCLOSURE:

44. It is common cause that defendant, through Stevenson, acquired the information from Brummer in and during October 1998. It is also common cause that such information was not communicated to defendant prior to the conclusion of the contract. Defendant admitted in the pleadings that the proposed development on the front property would seriously interfere with and obstruct the outstanding views from the property. Stevenson deliberately withheld the information from the parties concerned, despite the fact that he had been told by Mr Brummer that he was obliged to convey the information to any prospective purchaser.

45. The Lubners testified that if they had knowledge of the information at the time of the conclusion of the contract, they would not have purchased the property. This intention is reinforced by their conduct at the time they were given the information by

Mr Evans. The only reasonable inference the court can draw is that plaintiff would not have concluded the contract had it become aware of the information. Mr Stevenson must have realised at the time the contract was concluded, that the Lubners had not become aware of the information otherwise they would have raised the issue prior to signing the contract. Mr Stevenson was at all material times aware of the fact that the Lubners had placed a high premium on the panoramic views from the property of the Atlantic ocean and the Atlantic coast. It was one of the primary considerations by the Lubners for the purchase of the property.

46. Mr Stevenson not only failed to disclose the material fact to the Lubners, but perpetuated the fraud. On 7 December 1998 when confronted with such fact, Mr Stevenson gave the impression that he only became aware thereof that very day. The impression he tried to convey was false as, by his own admission, he became aware of the fact through Mr Brummer during October 1998. The same impression was perpetuated in the letter addressed by defendant's attorneys to plaintiff's attorneys dated 23 December 1998. Even that letter is silent of the fact that Mr Stevenson became aware of the information during October 1998. The first time defendant admitted that it had received the information from Mr Brummer was in its opposing affidavit to the summary judgment application in this case. Mr Stevenson was patently dishonest in not only withholding material information from Mr Lubner, but perpetuating the fraud through his conduct.

47. I am satisfied that defendant deliberately withheld material information from plaintiff in order to induce it to conclude the contract of sale. In my view the **omissio** amounted

to fraudulent non-disclosure.

DUTY TO DISCLOSE:

48. There is in our law no general duty upon contracting parties to disclose to each other any material facts and circumstances which are known to each other and which may influence the mind of the other party in deciding whether or not to conclude a contract. There is authority in our law for the proposition that a seller who knows of the existence of defects in the thing sold, but deliberately refrains from disclosing them to a buyer, in certain circumstances is guilty of fraud, justifying cancellation of the contract by a buyer who is not aware of them. This principle applies even where the defects are not such as would found the **actio redhibitoria** provided they materially affect the thing sold. (**SPEIGHT v GLASS & ANOTHER** 1961 (1) SA 778 (N) at 781H-782A and the authorities quoted therein; CHRISTIE on **THE LAW OF CONTRACT IN SOUTH AFRICA** 4th edition p 320.)

49. The non-disclosure of a fact is not necessarily confined or intrinsic to the subject matter of the contract. It could also be extraneous or extrinsic thereto, provided it materially impacts on the subject matter of the contract. Such non-disclosure can also give rise to relief where it forms part of the negotiations leading up to the contract. (**DIBLEY v FURTER** (*supra*) at 87F-G; **MAYES & ANOTHER v NOORDHOF** 1992 (4) SA 233 (C).) In **DIBLEY v FURTER** (*supra*) at 87B-C, **Van Zyl, J** (as he then was) quotes with approval from POTHIER in his **TREATISE ON THE CONTRACT OF SALE** 2.2, section 237, as follows:

“Good faith obliges the seller, not only not to suppress any of the intrinsic defects of the thing, but in general not to suppress anything concerning it, which may induce the buyer not to purchase or not to purchase at so high a price.”

50. The fraudulent non-disclosure of a material fact is, like fraudulent misrepresentation, **ex hypothesi** wrongful. Wrongfulness takes the form of an enquiry whether or not there is a duty to speak. If no such duty exists the non-disclosure cannot be wrongful. The test for determining the existence of a duty to speak lies in the legal convictions of the community (**boni mores**) and policy considerations based on full and frank disclosure. (LAWSA : para 421; **MESKIN, N O v ANGLO- AMERICAN CORPORATION OF S A LTD & ANOTHER** 1968 (4) SA 793 (W) at 799D-808A; **McCANN v GOODALL GROUP OF OPERATIONS (PTY) LTD** 1995 (2) SA 718 (C) at 722F-723A-C.)

51. A duty to speak, amongst other considerations, arises when there is an *“involuntary reliance of the one party on the frank disclosure of certain facts necessarily within the exclusive knowledge of the other such that, in fair dealing, the other’s right to have such information communicated to him would be mutually recognised by honest men in the circumstances.”* (*“The general rule of involuntary reliance”*.) (**PRETORIUS & ANOTHER v NATAL SOUTH SEA INN TRUST LTD (UNDER JUDICIAL MANAGEMENT)** 1965 (3) SA 410 (W) at 418D-E; **MESKIN, N O v ANGLO-AMERICAN CORPORATION OF SECOND APPELLANT LTD & ANOTHER** (supra) at 799D-808A; **GOLLACH &**

GOMPERTS (1967) (PTY) LTD v UNIVERSAL MILLS & PRODUCE CO (PTY) LTD & OTHERS 1978 (1) SA 914 (A) at 924A-B; **OZINSKY N O v LLOYD & OTHERS** (*supra*) at 418F-419B; **McCANN v GOODALL GROUP OF OPERATIONS (PTY) LTD** (*supra*) at 723G.)

52. **In casu** defendant admitted in the pleadings, subject to certain qualifications
- a) that the property enjoyed views which would be of great importance to plaintiff,
 - b) that the owner of the front property intended to construct a multi storey block of flats and was applying for a departure from the zoning regulations and
 - c) that such block of flats would seriously interfere and obstruct the outstanding views of the Atlantic ocean and the Atlantic coastline.

Mr Stevenson acquired knowledge of such application for the proposed development from Mr Brummer prior to the conclusion of the contract. Mr Stevenson was aware that he had to disclose the information to a prospective purchaser of the property. This became clear from the telephonic discussion between him and Mr Brummer. Although Mr Stevenson denied such discussion, the court found that Mr Stevenson was untruthful in this regard and accepted the version of Mr Brummer as correct.

53. The court accepted the evidence of Mr and Mrs Lubner that they were not aware of the application for the proposed development prior to concluding the contract. They only became aware thereof when they were informed about it by Mr Evans on 7 December 1998. Ms Rosenberg testified that she was not aware of the application

for the proposed development. Had she become aware thereof before the conclusion of the contract, she would have informed the Lubners about it. She further confirmed that it was a material consideration, and if she became aware of it, it was ethical for her to inform the Lubners thereof.

54. Mr Smiedt was asked under cross-examination whether the presence of a block of flats on either side of the front property would alert one to the possibility of development of the front property. He replied that the front property had been there for about 40 years without change. In his opinion there was no reason to alert anyone to the possibility of an imminent development.

55. Defendant conceded that the rule of “*involuntary reliance*” was applicable, but relied on the exception to the rule, as propounded by M A Millner in his article entitled **FRAUDULENT NON-DISCLOSURE** in 1957 SALJ 177, to escape liability. The exception was to the effect that where matters are equally open to common observation, or ascertainable by ordinaly diligence or accesible to both parties alike, the general rule is not applicable.

56. Mr **Louw** submitted that the contextual setting of the property in what was described by Mr Smiedt as the “*Sea Point flatland*” overwhelmingly established the clear and real prospect of the development of the front property. Furthermore, he argued that had the Lubners made enquiries at the Cape Town City Council prior to the conclusion of the contract as suggested by Ms Rosenberg, they would have discovered that the application for the proposed development was pending. Mr

Louw asked the court to find that the information was equally open to the plaintiff and defendant, or ascertainable by ordinary diligence or accessible to them alike and there was accordingly no duty to disclose this information.

57. Mr **Engers** submitted that defendant, through Mr Stevenson, had acquired the crucial information from Mr Brummer who had informed Mr Stevenson as the agent of the owner of the property. This information was not accessible to plaintiff. He argued further that such information was not open to common observation as the front property had remained undeveloped for over 40 years. There was accordingly a duty on Mr Stevenson to communicate the information to Mr Lubner prior to the conclusion of the contract.

58. The first question that this court has to determine, before reverting to the submissions by counsel, is: whether or not the exception to the rule, in the case of fraudulent non-disclosure, is part of our law. I have found various authorities where the general rule was applied in the case of fraudulent misrepresentation or fraudulent non-disclosure. In this regard see the various authorities cited above under paragraph 51, dealing with the general rule of involuntary reliance. I have, however, found no authorities where the exception to the general rule was applied in the case of fraudulent misrepresentation or fraudulent non-disclosure. In fact I have found authorities in our law to the contrary.

59. Our courts have never condoned fraudulent conduct on the part of litigants.

(**WELLS v SOUTH AFRICAN ALUMENITE COMPANY** (*supra*) at 72-73.)

Myburg, J in **OTTO & h ANDER v HEYMANS** 1971 (4) SA 148 (T) at 158H-159A refers to the **dicta** of **Ramsbottom, J** in **BROODRYK v SMUTS N O** 1942 TPD 47 at 55 quoting with approval the passages of **WESSELS** in **LAW OF CONTRACT IN SOUTH AFRICA**, para 1120:

“...that if in fact the person to whom a false representation is made relies on it implicitly, and thinking it unnecessary to verify it, enters into the contract, it does not lie in the mouth of the fraudulent party to say that the other party had the means of the information and negligently or stupidly did not avail himself of it.”

60. The object of the fraudulent party is precisely to mislead the other party against his better judgment. If he succeeds in this purpose, he cannot be heard to say that the other party should not have allowed himself to be misled so easily (**DE WET & YEATS: KONTRAKTEREG EN HANDELSREG** 3rd edition at p41); or if he had used due diligence he would have found out that the representation was untrue (**WILEY v AFRICAN REALTY TRUST LTD** 1908 TH 104 at 111-112). There is no obligation on the person to whom a fraudulent representation is made to establish whether such representation is true or false and may rely and act on such representation without making further inquiries. (**CHRISTIE** on **THE LAW OF CONTRACT IN SOUTH AFRICA**, 4th edition at p 329.)

61. The same consideration should, in my view, apply in the case of the non-disclosure

of a material fact which has induced a party to enter into a contract of sale. In such an instance, the fraudulent party cannot be heard to say that such fact was equally open to common observation or ascertainable by ordinary diligence or accessible to both parties alike when he is aware of the purchaser's ignorance of such fact. The parties are obliged to negotiate in good faith an element which is **sine qua non** to the conclusion of a valid contract. (**MUTUAL & FEDERAL INSURANCE CO LTD v OUDTSHOORN MUNICIPALITY** 1985 (1) SA 419 (A) at 433A-F.) In **ORANJE BENEFIT SOCIETY v CENTRAL MERCHANT BANK LTD** 1976 (4) SA 659 (A) at 674, the following **dictum** of **Van Winsen, J** in the court **a quo**, was approved by the Appellate Division:

"I have little doubt that our courts would regard it as unconscionable conduct on the part of a company who by a decision of its directors had fraudulently misled a party to a contract if it should seek to raise as a defence to a claim in delict that the representee, having constructive knowledge of its memorandum and articles, was not misled by its fraud."

62. Mr **Louw** submitted that the following passage, in the full bench decision of the Cape Provincial Division, in **McCANN v GOODALL GROUP OF OPERATIONS (PTY) LTD (supra)** at 723G-H reflects the state of our law to the duty to disclose or to speak, and I quote:

"A duty to disclose or to speak is said to arise when there is an 'involuntary reliance of the one party on the frank disclosure of certain facts necessarily lying within the exclusive knowledge of

the other such that, in fair dealing, the former's right to have such information communicated to him would be mutually recognised by honest men in the circumstances'.

There is no such duty 'where matters are equally open to common observation, or ascertainable by ordinary diligence, or accessible to both parties alike...'. ”

63. Mr **Louw** emphasised that the exception to the general rule is part and parcel of our law. I respectfully disagree. The authorities quoted in **McCANN**, apart from Millner's article, are no authority for the fact that the exception to the general rule is part of our law. Those authorities confirm that the general rule forms part of our law and is silent on the exception to the general rule. In any event, the remarks by **Van Zyl, J** is firstly **obiter**; secondly, the exception to the rule was not directly related to the point in issue; thirdly, the issue related to negligent misrepresentation and not fraudulent misrepresentation; and fourthly, the general rule and not the exception was applied to the circumstances of that case. **McCANN's** case is therefore no authority for the fact that *“where matters are equally open to common observation or ascertainable by ordinary diligence or accessible to both parties alike...”* forms part of our law and **a fortiori** not in the case of fraudulent misrepresentation or fraudulent non-disclosure. Whether or not the exception could apply in the case of negligent misrepresentation, I do not venture to express an opinion as I am not called upon in this matter to make a finding in respect thereof.

64. In my view, there is no persuasive authority that the exception to the general rule

forms part of our law in the case of fraudulent non-disclosure. But even if it was part of our law, the information given to Mr Stevenson by Mr Brummer concerning the application for the proposed development was in the exclusive knowledge of the defendant. Reverting to counsels' submissions, I agree with Mr **Engers** that defendant deliberately withheld crucial information from plaintiff with the intention of inducing it to conclude the contract of sale. It was highly improbable that the plaintiff would have obtained the information from observation or ordinary diligence or that it was accessible to it. I am satisfied that the Lubners did not have knowledge of the information before concluding the contract.

65. The contention of Mr **Louw** that the plaintiff could have obtained the information if it took the trouble of making inquiries from the Cape Town City Council, must be seen in the proper context. Firstly, defendant was not aware of the proposed application until informed by Mr Brummer. Secondly, Ms Rosenberg who had operated in the area for approximately 14 years, informed the Lubners that she was not aware of the application for the proposed development and estate agents are usually aware of proposed developments in the area. Thirdly, that the front property had remained undeveloped for approximately 40 years and there was nothing to alert it of any imminent development. It was therefore reasonable for Mr Lubner to assume that no development was contemplated on the front property.

66. Mr Lubner under cross-examination remarked that the possibility of development on the front property was like *"lightning striking the house"*. Mr **Louw** suggested that this remark reflected the state of mind of Mr Lubner and was consistent with the fact

that he was aware of the real prospect of a development on the front property. He asked the court to draw an inference that Mr Lubner had knowledge of the potential development of the front property. Although Mr Lubner could not explain the remark satisfactorily, he did say it was made *“off the top of my head”*. It was an unfortunate remark, but in my view the inference that Mr **Louw** wants the court to draw, is unwarranted and unreasonable in the light of all the circumstances.

67. Finally, Mr **Louw** submitted that any development on the front property involving departures from the zoning regulations was an impossibility. This, according to him, was reinforced by the subsequent withdrawal of the application for the proposed development. This submission does not detract from the fact that defendant acquired certain exclusive information which it was obliged by law to disclose to plaintiff. In breach of such duty it failed to disclose such material information to plaintiff. This finding is supported by a full bench of this Division in **McCANN v GOODALL GROUP OF OPERATIONS (PTY) LTD** (*supra*) at 726D-E, where it was held that liability for misrepresentation by silence or inaction arises in the case of a duty to disclose a material fact when

- a) 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, and
- b) such duty likewise arises if the defendant has knowledge of certain unusual characteristics relating to or circumstances surrounding the transaction in question and policy considerations require that the plaintiff be apprised thereof.

Both the above examples are apposite to the facts in this case.

68. The final submission by Mr **Engers** was to the effect that Section 32 read with Section 39 of the Constitution on the right of access to information gave plaintiff the right to the information known to Mr Stevenson. In view of the conclusion I have reached, it is not necessary for me to make a finding in respect of the Constitutional point raised by Mr **Engers**.

69. In the light of the circumstances I conclude that:

- a) the information conveyed by Mr Brummer to Mr Stevenson concerning the application for departure from the zoning regulations in respect of a proposed development on the front property, was a material fact;
- b) defendant deliberately and with the intention of inducing plaintiff to conclude the contract of sale, withheld such information from plaintiff;
- c) there was a legal duty on defendant to disclose such information but for such non-disclosure plaintiff would not have concluded the contract of sale.

Because of the decision I arrived at, it is not necessary to consider defendant's claim in reconvention and the relief sought in respect thereof must accordingly fail.

70. In the result judgment is granted in favour of plaintiff for:

- a) Payment of the sums of
 - i) R265 000,00 (two hundred and sixty five thousand rand) and

- ii) R7 192,62 (seven thousand one hundred and ninetytwo rand and sixty two cents).
- b) Interest on the said sums from the date on which the amounts were paid to Meyer De Waal Inc to date of repayment either at the rate earned or at the legal rate applicable, whichever is the higher.
- c) Costs of suit.
- d) Defendant's claim in reconvention is dismissed with costs.

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