IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO. 1639/13

HELD AT MBABANE

In the matter between:

ALBERT MSHIYENI THWALA **PLAINTIFF**

And

SWAZILAND WATER SERVCES CORPORATION **DEFENDANT**

Neutral Citation: *Albert Mshiyeni Thwala vs Swaziland Water Services Corporation [1639/13] [2019] SZHC 253 (13 December, 2019)*

Coram: M. LANGWENYA J.

Heard: 3 April 2018; 27, 29 March 2019; 13, 18 June 2019; 11 July 2019; 30 September 2019; 7 November 2019; 14 November 2019; 2 , 13 December 2019.

Delivered: 13 December 2019

Summary: *Civil Procedure- plaintiff's land expropriated by defendant-plaintiff entitled to compensation-Section 19(2)(b) of the Constitution Act-Section 25 (1) and(5) of the Water Service and Corporation Act 1992.*

Evidence- plaintiff bears onus of proof on a balance of probabilities that there were fruit trees that were destroyed by defendant when it expropriated his land-that he is entitled to compensation for the fruit trees-defendant contend that plaintiff signed agreement in full and final settlement for compensation and cannot be heard to be claiming for more compensation- contract induced by under undue influence equates to one induced by fraudulent misrepresentation-Plaintiff's claim granted with costs.

JUDGMENT

[1] In this matter, Mr Thwala who is the plaintiff (I will refer to him by that designation) instituted action to recover the amount of E107, 635.00; interest at the rate of 9% per annum as well as costs of suit from Swaziland Water Services Corporation (SWSC) the defendant (I will, in this judgment refer to SWSC by that designation). At the hearing of the matter and during the making of the opening statement, the Court was told that the case for the plaintiff is premised on compensation for his fruit trees which were destroyed by the defendant when they expropriated his land at Sikhuphe/Malindza area. It was submitted on behalf of the plaintiff that despite negotiations between the parties concerning payment of compensation for his orchard, the defendant has refused to pay and as such is liable to pay plaintiff the amount claimed.

[2] In response to plaintiff's opening statement, it was submitted on behalf of defendant that the defendant is not indebted to the plaintiff for any amount claimed. Defendant submits that the plaintiff was compensated in full and final settlement and the release and discharge agreement was signed in full and final settlement. It is the case of the defendant that the plaintiff waived any rights he might have had once the release and discharged agreement was signed by both parties. It is the case of the defendant further that there was no orchard on the land in question and that even if there was, by signing the release and discharge agreement, plaintiff waived his right to make any claim against the defendant in this regard. For good measure, defendant states that if the alleged orchard existed, it was not for commercial purposes.

Background

[3] The background facts (which are not in dispute) to the plaintiff's claim are the following: in 2009, the defendant followed customary procedure and expropriated land belonging to the plaintiff at Sikhuphe/Malindza area. The plaintiff was allocated alternative land to build a new home. The defendant instructed Emozane Cost Consultants (Pty) Ltd, a firm of quantity surveyors to assess and evaluate plaintiff's house so that he could be compensated for same. Emozane Cost Consultants valued plaintiff's house at E40, 200.00 and this amount was paid to the plaintiff by the defendants. At all material times, the defendant was represented by Mr Mkhonta and Mr Mancoba Dlamini when negotiations pertaining to the payment of compensation to plaintiff were ongoing. The expropriated land was for the construction of a water reservoir which would supply the Sikhuphe area when the KM III airport was being constructed.

The Plaintiff's Case

[4] The plaintiff led his own evidence and that of Machawe Muntfuakalahlwa Shongwe as well as that of Mkhumbi Amos Vilakati herein referred to as PW1, PW2 and PW3 respectively.

[5] The plaintiff testified that his home is at Sikhuphe and that he is a farmer specializing in fruit tree farming. He went as far as Standard 1 at school. Prior to 2009, he had a homestead at Malindza where he had also planted a total of nineteen fruit trees. Eight of those trees were avocado, five were papaya (paw-paw), four were mango trees and two of the trees were berries. In 2009, he was approached by the defendant who was represented by Mr Mkhonta and Mr Mancoba Dlamini and informed through the Malindza royal kraal that he had to move from his homestead to make way for the construction of a water reservoir that would supply water to the KM III airport which was still under construction.

[6] The defendant undertook to build the plaintiff a home, install running water, fence it and plant the fruit trees. The representatives of the defendant assured the plaintiff that his new home would be better than the one he had at the time. According to the plaintiff, his new home would be built on the alternative land which the royal kraal would allocate him. It is the evidence of the plaintiff that he agreed that the defendant can build him a new home. It was before he had relocated to his new land that construction work commenced at his homestead and

a guard house was built while he still lived there. Plaintiff stated that the size of his land was more than one hectare.

[7] The defendant, represented by Mr Mkhonta and Mr Mancoba Dlamini later asked the plaintiff to provide it with a quotation for his fruit trees as well as the house. The plaintiff protested and reminded them that they promised to build him a house but was informed by Mr Mkhonta that the defendant deals only with pipes and not with building homes. It is the evidence of the plaintiff that he then approached the Ministry of Agriculture to have his orchard evaluated and assessed. Plaintiff also approached a private individual to assess his house. The plaintiff testified that according to the report from the person he had hired to evaluate his house, the house was worth E36, 365.00 plus 10% which totals E40, 200.00. The report for the house was handed into Court as it had been discovered and marked exhibit 'B'.

[8] The plaintiff testified that the Ministry of Agriculture detailed Machawe Shongwe to assess and evaluate as well as cost his orchard. He was furnished with the report of the evaluation by the Ministry. The report was provisionally marked as exhibit 'A'. The trees were planted in the year 2009 and when defendant came to expropriate plaintiff's land the trees had been planted and they were still young when the defendant started constructing the water reservoir on plaintiff's land. At the time, plaintiff estimated the trees to be plus minus fifty centimetres tall. When the officials from the Ministry of Agriculture gave plaintiff the report, they

explained it to him. In terms of the report, the total amount the trees are worth is E107, 635.00.

[9] It is plaintiff's evidence that he then took the reports to the defendant's place of business and left it with a certain Gamedze who was manning the reception/front desk on the day in question. It was when Mancoba Dlamini and Mr Mkhonta returned to plaintiff's land that plaintiff enquired if they had received his reports and Mancoba stated that they had not received the reports. Plaintiff then gave Mancoba and Mr Mkhonta copies of the reports.

[10] A week later, plaintiff received a call from Mr Mkhonta informing him that he had lost the fruit tree report and suggesting that plaintiff met Mkhonta in Manzini at around 1pm because Mkhonta was on his way to Siphofaneni. Plaintiff obliged, met and gave Mr Mkhonta another copy of the fruit tree report. After three to four weeks, Mr Mkhonta again called the plaintiff and told him he had again lost the fruit tree report. Mr Mkhonta enquired about plaintiff's whereabouts and was told by plaintiff that he was on a bus going home. Mr Mkhonta and the plaintiff met at Mafutseni and plaintiff gave Mkhonta another copy of the report about the fruit trees.

[11] Subsequently, in July 2011 the plaintiff was called to come to defendant's headquarters at eZulwini where Mr Mkhonta and Mr Dlamini had convened a meeting. Plaintiff was made to sign certain documents on the pretext that these documents would facilitate the payment of compensation for both the house and

the fruit trees. Before the document was signed, plaintiff stated that he was told by Mr Mkhonta that they were in a rush to attend another meeting and that plaintiff should therefore quickly sign the document. Mr Mkhonta and Mr Dlamini then handed the plaintiff a cheque of E40, 200.00 as compensation for the house. When the plaintiff enquired about the compensation for the fruit trees, Mr Mkhonta advised him that it would be paid at a later stage. The reality is that the compensation was never paid to the plaintiff. Plaintiff testified that no one interpreted or translated the document to him and he did not have a representative with him when he was made to sign the said document. Plaintiff took the cheque and deposited it in his bank account.

[12] The plaintiff testified that during the signing ceremony he had no reason to suspect foul play because the negotiations had been without incident and the parties had built trust. It is in hindsight that plaintiff surmised that Mr Mkhonta and Mr Dlamini took advantage of his limited education and duped him into signing a Memorandum of Agreement-exhibit 3 which provided for only the payment of compensation for the house.

[13] It is the evidence of the plaintiff that on several occasions he engaged and negotiated with Mr Mkhonta and Mr Mancoba Dlamini on the payment for his orchard without success. Instead of getting positive feedback on his compensation for his orchard, plaintiff told the Court, Mr Mancoba asked plaintiff to advance him cash. The plaintiff subsequently instructed an attorney to claim the amount reflected in the evaluation report of his fruit trees.

[14] It is the evidence of the plaintiff that he did not agree that the E40, 200.00 was in full and final settlement and that he now wanted the Court to help him recover the E107, 635.00 for his fruit trees.

[15] During cross examination, it was put to the plaintiff that in 2011 the fruit trees were not bearing fruit and therefore there was no need to compensate him. Plaintiff's response was that the fruit trees would bear fruit in the future as he was tending to the trees in such a way they bore much fruit when the time came.

[16] It was put to the plaintiff that by virtue of signing the agreement absolving the defendant from further claims, the defendant was not liable to pay plaintiff for anything, this claim inclusive. The plaintiff's response was that he was duped into signing the said agreement by defendant who did not explain to him what the agreement entailed. Plaintiff stated that he was informed that he was signing for compensation for his house, and fruit trees. He assumed that such compensation will take into account his reports for the evaluation of the house as well as the report evaluating his fruit trees. It was only when he saw the cheque of E40,200.00 that he realized he had not been compensated for his fruit trees.

[17] It was further put to the plaintiff that there was no orchard on his land when plaintiff's land was expropriated by defendant. It was put also that had there been an orchard there, Mr Dlamini of Emozane quantity surveyors would have been

told by the plaintiff to assess the value of the fruit trees as well. Plaintiff's response was that Mr Dlamini's brief was to evaluate the house and not the fruit trees. Plaintiff's response in this regard is confirmed by DW2 Emmanuel Samketi Dlamini.

[18] It was put to the plaintiff that there were no fruit trees on plaintiff's land when defendant expropriated plaintiff's land; and that if there were, the trees were not valued at E107, 635.00. Plaintiff's response is that the trees were evaluated and costed by experts and not by the plaintiff. Plaintiff denied that the compensation for fruit trees was disproportionate to the value of the fruit trees given that he had bought the trees for E50 each and that the average height at the time of destruction of the trees was fifty centimetres. Plaintiff stated instead that some of the trees had started bearing fruit at their age and height.

[19] PW2 is Maqhawe Muntfuakalahlwa Shongwe. He testified that he is now a retired civil servant and a resident of Mayiwane. Prior to his retirement he worked in the Ministry of Agriculture for thirty-five years where he held various positions including being a national director of horticulture as well as being a senior extension officer. At the time of his retirement in 2017, he was a senior extension officer stationed in the Manzini region. He holds a diploma in general agriculture from the University of Botswana, Lesotho and Swaziland (UBLS) and has attended a number of short courses related to horticulture in Australia, United States of America and in Taiwan.

[20] It is his evidence that in February 2011, he was detailed to inspect, assess and cost damage on plaintiff's fruit trees at or near Mbadlane in the Lubombo region. PW2 proceeded to plaintiff's homestead in the company of the plaintiff and was using a government motor vehicle. On arrival at plaintiff's home, he saw the orchard with different fruit trees. He was informed by plaintiff that the trees were planted in 2009. PW2 observed that some of the trees were still young while some of the trees were destroyed by heavy plant wheels which ran over them; a few of the trees were still in good shape although his assessment is that the trees were no longer being taken care of. He saw two mango trees that were in good shape and showed also that fruit had just been reaped from the mango trees.

[21] According to PW2's evidence, the fruit crop were of different variety namely, eight avocado trees, two mango trees (dried up) and two mango trees were in good shape, five papaya (paw-paw) trees and two of them were already bearing fruit showing signs that fruit was reaped from them while the other paw-paw trees were stunted. There were also water berries trees which were in good health; one of the water berries tree showed that it had just started bearing fruit. PW2 stated that the plaintiff explained to him that he was being moved to a different location.

[22] After PW2 inspected plaintiff's orchard, he retired to his office to prepare a Crop Damage Assessment Report which was presented to Court as exhibit 'A'. It was the evidence of PW2 that in the report he assessed damage to the trees which had not borne fruit and the owner was not able to produce what he had planted the trees for. He then estimated the number of years the trees would take bearing fruit if they had not been destroyed as well as the harvest of each tree over those years. He then made an estimate of the financial reward the plaintiff was projected to get

over the number of estimated years the trees would be bearing fruit. He then calculated an average amount of money that each tree would produce in its lifespan. The fact that he took an average amount of how much each tree would produce means he did not cost the trees and their estimated produce on the high side. PW2 then handed exhibit 'A' into Court.

[23] During cross examination, PW2 stated that he could not confirm that the trees were for commercial or subsistence purposes. PW2 stated that the standard measure he used did not distinguish between trees planted for commercial purposes and those grown for subsistence purposes. It was put to PW2 that his account was at variance with that of PW1 who estimated his trees to be fifty centimetres high while PW2 said the trees were 1.5 metres tall. PW2's response is that he did not measure the height of the trees only gave an estimation of the height. It was further put to PW2 that it was inconceivable that fruit trees with a height of 50cm could be valued at E107, 635.00 to which PW2 stated that the assessment was based on anticipation that the trees had a thirty year lifespan during which time the trees would bear fruit and act as a source of livelihood for the plaintiff.

[24] During cross examination it was also put to PW2 that there were contradictions in his oral evidence with some parts of exhibit A. It was put to PW2 that in chief he told the Court that on inspection of plaintiff's orchard he found some of the fruit trees while in his report he states that the trees were totally destroyed. PW2's response was that his observations and content of the report was

based on what the plaintiff had told him namely, that plaintiff was leaving the land in question as such would no longer be able to tend to the trees as he would cease to have control over the land and the trees that remained in his orchard.

[25] PW3 is Mkhumbi Amos Vilakati. PW3 knows the plaintiff as he is also a resident of Sikhuphe. It was PW3's evidence that in 2009, plaintiff's land was expropriated by defendant in order to build a water reservoir. PW3 got a temporary job from defendant during the time plaintiff's land was expropriated and installed a pipe and also worked as a builder on plaintiff's land. PW3 told the Court that on plaintiff's land there was a house and an orchard. He specifically remembered seeing paw-paw and mango trees. His estimate of the height of the trees ranged between plus minus one and a half metres to two metres. In PW3's view the trees were bearing fruit. He estimates the trees to have been about ten in number.

Defendant's Case

[26] In support of its case, the defendant led the evidence of Jameson Mkhonta and that of Emmanuel Samketi Dlamini who are herein referred to as DW1 and DW2 respectively.

[26] It is the evidence of DW1 that he was employed by the defendant in 1975 and retired in the year 2011. He stated that in the year 2009 he was a public relations manager within the defendant's establishment. Soon after he retired from

defendant, he was re-engaged on a temporary/contract basis and now works in the public affairs office as a national events' officer.

[27] Before the commencement of the construction of the KM III airport at Sikhuphe, the defendant was mandated to supply water at Sikhuphe area. Plaintiff's land was identified as a strategic location for constructing a water reservoir to supply Sikhuphe. With the assistance of the Malindza royal kraal, an alternative piece of land was identified and plaintiff was asked to relocate to the new piece of land. According to DW1, it was agreed between plaintiff and defendant that he would be compensated for his house. Defendant engaged Emozane Cost Consultants (Pty) Ltd to evaluate plaintiff's house. The house was valued at E40, 200 by the consultants. It is DW1's evidence that after the evaluation an agreement was drafted by the defendant and DW1 and Mancoba Dlamini signed the agreement as witnesses.

[28] DW1's testimony is that at all material times he and Mancoba communicated with the plaintiff concerning negotiations affecting plaintiff's expropriated land and that in their interactions with the plaintiff they spoke in SiSwati. DW1 stated that even when they were drafting the agreement, they informed the plaintiff that the agreement was about what they had all along been telling him.

[26] It was DW1's testimony that the agreement was signed by the parties in full and final settlement and the plaintiff was given a cheque of E40, 200. During the signing ceremony, DW1 and Mancoba explained the agreement in SiSwati to the

plaintiff as it was written in English. It is DW1's evidence that the plaintiff was in the company of a representative when the agreement was signed.

[27] It was the evidence of DW1 that at the time plaintiff's house was evaluated by Emozane Cost Consultants in April 2011 there were no fruit trees present on plaintiff's land and that if such fruit trees existed, the Emozane evaluation report would have included the trees. It was DW1's evidence that the photographs taken by the evaluators of plaintiff's house only show indigenous trees and not the fruit trees complained of. DW1 told the Court that in his view, it did not make sense that the plaintiff could sign an agreement in full and final settlement, be paid and continue to claim further compensation for fruit trees whose value and amount far exceeds that of plaintiff's house.

[28] I must pause at this stage and point out that the plaintiff and his witnesses were very impressive to me. They were composed and gave evidence matter of factly. Regrettably, the same cannot be said to be true of DW1. To me, DW1 was a horse of a different colour. He initially denied ever seeing exhibit A- the crop damage and assessment report. He further denied knowledge of negotiations involving plaintiff's fruit trees but when he was asked searching questions about events leading to the plaintiff going to DW1's sister at the Manzini market to leave the evaluation report of his trees, DW1 conceded that he did ask the plaintiff to leave the report with DW1's sister. He stated however that this he did because he was sympathetic to the plight of the plaintiff concerning his fruit trees such that he even contemplated paying him from his pocket. It is not clear to me why DW1

would want to pay the plaintiff from his pocket for the trees if the trees never existed in the first place.

[29] It is the evidence of the plaintiff which is not disputed that they had agreed with DW1 that the plaintiff would be responsible for ensuring that the trees are assessed and that he would then submit the report to DW1. That DW2 testified that the plaintiff did not show DW2 the fruit trees when he went to evaluate plaintiff's house- is, in my view an exercise in damage control as well as an afterthought on DW2's part. DW2 had one mission only when he went to plaintiff's home in March 2011- to evaluate plaintiff's house.

[30] When DW1 was pressed further about the negotiations he, Mancoba and plaintiff held about compensating the plaintiff for his fruit trees, DW1 sought to push the blame to Mancoba. DW1 stated that it was Mancoba who came with the version that plaintiff must be compensated for his fruit trees.

[31] It was put to DW1 during cross examination that plaintiff's claim for compensation for his trees was known to DW1 before exhibit 3-the Release and Discharge Agreement was signed. DW1's response was they did not know about exhibit A before exhibit 3 was signed. When DW1 was pressed that based on the dates –that exhibit A was dated earlier than exhibit 3, he relented and stated that they knew about plaintiff's claim to compensation for his fruit trees before exhibit 3 was signed.

[32] DW 1 conceded during cross examination that exhibit 3 was signed before the cheque was handed over to the plaintiff.

[33] It was also put to DW1 that the plaintiff came to the signing ceremony with the understanding that he was going to be compensated for his fence, house and fruit trees. DW1's response was that the atmosphere during the meeting was good and that Thwala got a good deal and he knows that.

[34] In his evidence in chief, DW1 gave the impression that the agreement was interpreted into the SiSwati language to the plaintiff, only to concede during cross examination that the plaintiff was not informed in SiSwati, verbatim and clause by clause what the agreement said.

[35] The last witness for defendant's case is Emmanuel Dlamini DW2. He testified that he is the director of Emozane Cost Consultants (Pty) Ltd, a firm of quantity surveyors based in Mbabane. DW4's first meeting with the plaintiff was on 28 March 2011 when he had gone to plaintiff's place to evaluate plaintiff's house. He prepared a report where he stated that plaintiff's house cost E40, 200. While he was at plaintiff's premises he took photographs and later prepared the valuation report which was handed into Court and marked as exhibit B. The photographs were attached to the valuation report.

[36] It was DW2's evidence that during the inspection of plaintiff's homestead, he did not see fruit trees but saw only indigenous trees. DW2 further told the Court that the plaintiff never told him about fruit trees and that if he had, he would have taken photographs of same. He was quick to point out though that his instruction from the defendant was to evaluate the house and that his qualifications and expertise was in quantity surveying and costing of construction works. He stated though that had plaintiff informed him of the trees, he would have taken photographs of the trees and consulted relevant experts to assess the orchard. I have already expressed my opinion in the above paragraphs about DW2's evidence in this regard.

The Legal Principles

[37] The plaintiff bore the overall *onus* of proving on a balance of probabilities that: i) there were fruit trees on his land when the defendant expropriated it; ii) that the fruit trees were destroyed by the defendant; iii) the value of the fruit trees, and iv) of rebutting defendant's contention that plaintiff was compensated for the fruit trees as well.

[38] I am satisfied that the plaintiff has proved on a balance of probabilities that indeed there were fruit trees on his land before it was expropriated by the defendant. PW2 Maqhawe Shongwe was an impressive witness who explained to the Court his assessment of the fruit trees and what remained of some of them when he was directed to carry out the assessment and costing of plaintiff's orchard. Indeed, I can see no reason, and none was shown to me, why out of the

blue the plaintiff would concoct a story about 'non- existent' fruit trees as well as negotiations he had with representatives of the defendant to get his compensation for the fruit trees.

[39] The pieces of evidence which I accept that cumulatively support plaintiff's version that the fruit trees existed is that given by plaintiff, PW2 and PW3 as well as DW1. DW1 conceded during cross examination that he, Mancoba Dlamini and the plaintiff, had on previous occasions discussed how best plaintiff could be compensated for his fruit trees. The evidence that the plaintiff had, on various occasions availed the valuation report of his fruit trees and that such report was 'conveniently' misplaced by both DW1 and Mancoba Dlamini gives credence to the version of the plaintiff.

[40] The value of the fruit trees was proved through the report that was presented by PW2- an expert in horticulture. This evidence was not controverted by any expert called by the defendant. Except to argue that the value of the fruit trees was more than that of the house and therefore unreasonable, there was no attempt on the part of the defendant to lead the evidence of an expert to show that the price of the fruit trees given by PW2 was unreasonably high. In this regard, the defendant failed, in its corresponding duty to rebut the plaintiff's version.

[41] It is trite law that in our jurisdiction a person who is deprived of his/her property is entitled to '**prompt payment of fair and adequate compensation**[1]' (my emphasis); and that where the defendant or its duly authorized officer cuts down or clears away any trees…which interferes with construction…works of the defendant, the aggrieved person shall be given full compensation for all damage sustained by that person[2].

[42] In my view, fair and adequate compensation is what both parties would agree is fair and adequate compensation after consulting experts in the field to do the assessment and valuation of property for which compensation is claimed. In the absence of rebuttal of plaintiff's valuation report of the fruit trees, there is nothing to suggest that the amount reflected in exhibit A is not fair and adequate for plaintiff's fruit trees.

[43] The defendant's contention is that the plaintiff signed exhibit 3-the release and discharge agreement in full and final settlement. The words 'in full and final settlement' are not ordinary words as they are loaded with legal gun- powder which an unsophisticated Standard 1 'graduate' cannot be expected to understand. Consequently, Mr Mancoba Dlamini and Mr Jameson Mkhonta had a duty to

[1] Section 19(2)(b) of the Constitution Act 1/2005 which states as follows: 'A person shall not be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied-
(a)…
(b) the compulsory taking of possession or acquisition of the property is made under a law which makes provision for-
(i) prompt payment of fair and adequate compensation; and
(ii) a right of access to a court of law by any person who has an inherent interest in or right over the property;
[2] Section 25(1) and (5) of the Water Services Corporation Act, 1992.

either explain the agreement clause by clause to the plaintiff before he signed it or to advise plaintiff to refer the document to his legal representative for explanation before he signed it. Instead, there is evidence from the plaintiff that Mr Mkhonta and Mr Mancoba Dlamini 'pressured' the plaintiff to sign the agreement as they informed him they were in rush to attend another meeting. This evidence was not disputed by the defendant. It was only during the trial when DW1 was cross examined that he stated that the plaintiff came to the signing ceremony in the company of a representative. Un-meritoriously, the issue of plaintiff having a representative during the signing ceremony was never put to the plaintiff. To compound this issue, the defendant did not plead that the plaintiff signed exhibit 3 in the presence of his representative. The law in this regard is settled- a party is not permitted to raise a defence that was not pleaded at the trial[3].

[44] The plaintiff, not in so many words told the Court that he was informed by both DW1 and Mancoba Dlamini that he was signing the document which was compensating him for his house and fruit trees. The plaintiff says he signed the agreement before he was given the cheque of E40, 200. No one explained the agreement verbatim and clause by clause to the plaintiff. During cross examination DW1 conceded that the agreement was not explained clause by clause to the plaintiff. The plaintiff also told the Court that both Mkhonta and Dlamini duped him into signing the agreement when they claimed that his signature would facilitate the payment of compensation for both his house and the fruit trees. It was only after he had signed the agreement and was given the cheque of E40,200 that the plaintiff was surprised and enquired about the compensation

[3] *The Swaziland Government v Aaron Ngomane* Civil Appeal Case No. 25/2013 [2013] SZSC 73.

for the fruit trees. Plaintiff says he was told that the compensation for the fruit trees would be paid at a later stage. That was a ruse as the compensation was never paid.

[45] The evidence concerning the surrounding circumstances during the signing ceremony points to the existence of undue influence which was brought to bear on the plaintiff. The requirements for undue influence were set out in *Patel v Grobbelaar*[4] namely that the aggrieved person was subjected to influence by another, that the influence weakened the aggrieved person's capacity to resist and rendered the aggrieved person pliable, that the other person exploited this influence to persuade the aggrieved person to agree to a transaction which was both to the aggrieved person's detriment and was a transaction that would not have been concluded had the aggrieved person acted of his own free will.

[46] It is settled law that a contract that is induced by undue influence cannot stand as it is in the same footing as a contract induced by fraudulent misrepresentation[5]. The plaintiff has, in my view adduced evidence which shows that he has discharged the *onus* to establish undue influence in the signing by himself of the agreement with the defendant.

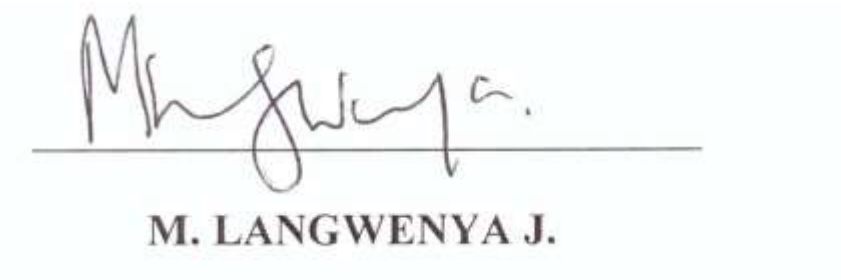
[47] For the above reasons, the following order is made:

[4] 1974(1) SA 532 (AD).
[5] See *Armstrong v Magid and Another* 1937 AD 260; *Busisiwe Manana v Franco Colasuonno* Civil case No. 2014.2011

1. The defendant is to pay plaintiff the sum of E107, 635.00 (one hundred and seven thousand, six hundred and thirty-five Emalangeni).

2. Interest on the sum of E107, 635.00 (one hundred and seven thousand, six hundred and thirty-five Emalangeni) at the rate of 9% a *temporae morae*.

3. Costs of suit.



M. LANGWENYA J.

For the Plaintiff: Mr V.Z. Dlamini

For the Defendant: Mr V. Thomo and Mr S. Shongwe