REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 4151/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: **05/09/23**

SIGNATURE

In the matter between:

DAPHNEY CHUMA	Plaintiff
and	
BONDCOR (PTY) LTD	1st Defendant
WERNER SERFONTEIN	2nd Defendant
STANDARD BANK OF SOUTH AFRICA LTD	3rd Defendant

JUDGMENT

MNGQIBISA-THUSI J

[1] The plaintiff instituted a claim against the first and second defendants based on innocent or negligent misrepresentation, alternatively, for a latent effect in a property the first defendant sold her. The subject-matter of the claim is vacant land situated at Portion […] of erf 7[…], L[…] Manor, Extension […], Township Registration Division J.R., Province of Gauteng ("the property"). The plaintiff has undertaken to return the property to the seller.

[2] In the main the plaintiff is claiming the repayment of the purchase price and the return of the property to the first defendant on the ground that at the time of the sale of the property, the property had a latent defect which rendered it not fit for the purpose for which it was intended. In her particulars of claim the plaintiff seeks the following:

2.1 Repayment of the sum of R600,000.00, being the purchase price;

2.2 Interest from the date the plaintiff and the third defendant entered into a mortgage bond;

2.3 R20,127.38 in respect of rates and taxes and any other municipal services paid to date in respect of the property;

2.4 R17, 082.29 paid for transfer costs.

2.5 Costs.

[3] The first defendant is a property dealing entity which deals mainly with the purchase, sale and renting of immovable property. The second defendant is the sole director of the first defendant.

[4] The defendants deny any liability for the plaintiff's claim. In the event it is found that the property had a latent defect at the time of the sale, the defendants have

denied knowledge of the latent defect and plead that they are protected by the *voetstoots* clause contained in the sale agreement.

[5] The following facts are common cause. On 4 August 2017 the plaintiff and the first defendant, represented by the second defendant, concluded an agreement in terms of which the first defendant sold the property to the plaintiff for R600, 000.00. The agreement provided, *inter alia*, that:

5.1 the plaintiff was to pay a deposit of R270,000 by 30 August 2017;

5.2 the sales agreement was also subject to the plaintiff obtaining a mortgage bond to cover the purchase price;

5.3 the plaintiff indemnifies the defendants against any latent defects in the property (voetstoots clause).

[6] On 4 September 2017 the plaintiff paid the deposit in the amount of R270, 000.00. The plaintiff also paid the transfer fees in the amount of R 17, 082. 29.

[7] On 13 December 2017 the property was registered in the name of the plaintiff after the third defendant, Standard Bank Ltd, approved the plaintiff's bond and registered a mortgage bond over the property.

[8] No relief is sought against the third defendant.

[9] The plaintiff's evidence is as follows. During 2017 and whilst driving around Centurion, she came across the property which had a 'for sale' sign. She contacted the reflected estate agent, Mr Anton Vorster of 'Apple Properties'. Mr Vorster confirmed that the property was on sale and that it came with approved plans for a double storey house. However, the estate agent did not provide her with the plans. Ms Chuma testified that she informed the estate agent that she

was interested in buying the property as she had plans to build herself a house. After signing the offer to purchase, in 2018 she had plans drawn for a single storey house. On submission of the plans to the relevant municipality, she did not obtain approval for the plans. The municipality informed her that there were no current approved plans and that there had been plans previously approved which have since lapsed as no building works took place within 12 months of their approval, as prescribed by the local regulations. She was further informed that the property was underlain by dolomite and that a dolomite stability investigation was required.

[10] The plaintiff testified that as a result of the information received from the municipality, she appointed Ms Beverley Keyter ("Ms Keyter") of Geostable SA CC, to conduct a dolomite stability study of the property. In her report Ms Keyter made reference to a geological report on the property prepared by a certain Mr Johann Van der Merwe of Johann vd Merwe (Pty) Ltd, dated 6 September 2001, which the plaintiff was unaware of and had not been informed about by the first defendant.

[11] The plaintiff further testified that she later obtained the previously approved plans for the property after Mr Vorster had referred her to a house in Arcadia where a gardener gave her an envelope containing the building plans for the property. With the lapsed plans, the plaintiff discovered that there was a geological report on the property prepared by Mr van der Merwe.

[12] The plaintiff further testified that had she been aware of the Van der Merwe report she would not have purchased the property as the purpose of purchasing the property was to build a residential dwelling. As a result of the dolomitic nature of the property, she cannot use the property to build a house even though it is zoned 'residential'. She further testified that the latent defect was not visible to the naked eye.

[13] Furthermore, the plaintiff testified that she had sent the quotation and pre-agreement statement with special conditions from the third defendant to the Mr Vorster on 6 September 2017, prior to registration of the property in her name. The quotation and pre-agreement statement reflects, *inter alia*, that:

> "3.7.3 4.1 this loan has been granted in terms of the intended use and occupation of the property as declared by you. The loan is conditional on us obtaining an original declaration for this purpose prior to registration confirming the intended use and occupation of the property;
>
> 3.7.34.2 vacant land. The property will be used solely to develop a normal residential dwelling."

[14] The plaintiff testified that in light of the quotation and pre-agreement statement sent to the agent the agent must have been aware of the declaration made to the bank in so far as the intended use of the property concerned.

[15] The next witness for the plaintiff was Ms Keyter, an engineering geologist, whose qualifications were not disputed. In her report Ms Keyter concluded that according to the South African National Standards (SANS1936 (2012)) and the National Home Builders Registration Council's manual (NHBRC (2015)) the site is unsuitable for residential development and no residential development will be allowed on the property under current regulations. She further testified that it is possible to have the property rezoned for commercial use. Miss Keyter further testified that the property has a risk for accumulation of water and a high risk of sinkhole formation. According to Ms Keyter, the property has no resale value from a residential point of view. She further testified that in terms of the Van der Merwe Report, precautionary measures would have to be taken in order to construct a residential dwelling on the property as set out in section of 4 and 5 of the Report.

[16] Sections 4 and 5 of the Van der Merwe Report read as follows:

"4. **Stability of the Site**

Based on the results of the penetrometer test pit investigation, the property tentatively classifies as being dolomite stability "Class IV" in terms of the risk of a specified sinkhole forming based on the scenario supposition of Buttrick et al (2001). "Class IV" has a medium risk for the formation of small to large sink holes and a low risk of very large sized sinkholes formation and a medium risk for the formation of dolines.

The provisional "D" designation of the site is "D3" which implies that the risk of sinkhole and doline formation is adjudged to be such that precautionary measures in addition to those pertaining to the prevention of concentrated ingress of water into the ground, are required to permit the construction of rigid structures.

These measures are designed so as to ensure the long-term stability of the site and to ensure a continuous assessment of the overall stability of the site in terms of the new development.

On the basis of all the observations presented in this report, it is concluded that the potential for the development of sinkholes and dolines is at a low enough level to regard it as an acceptable risk provided that the drainage precautions for developing on dolomitic areas and the recommended type of development are implemented across the entire site.

5. **Foundation Recommendations**

The site classifies as a "class C1/S2 /H/P " according to the guidelines of the National Home Builders Registration Council (NHBRC) Standards and Guidelines of 1995 in view of the potentially compressible and dissimilar

foundation soils which blanket the site, one of the following foundation systems may be considered for the construction of single and double storey structures:-

Enhanced earth mattress

…

Stiffened of Cellular Raft

…

Piled or Pier Foundation

…

The design and construction of raft foundations (whether soil or concrete) should be done in accordance with and under supervision of a civil or structural engineer. The possible presence of hard rock dolomite pinnacles or large slabs and blocks of chert or caring with N foundation trenches may not be ruled out entirely. Where is these rocks are too cumbersome for removal and in order not to disturb the surrounding foundations soils unduly, it is recommended that the rock be left in place and that the foundation concrete be reinforced with concrete in order to counter any differential movements that may take place.

Fairly easy excavation using hand tools or conventional earth-moving equipment, will be required for the installation of service trenches in the upper site soils.

The drainage precautionary measures and a special installation measures for underground wet services, applicable for dolomitic terrain and in compliance with the requirements of the centurion town council, should be adhered to on this site. These precautions I designed to neutralize the adverse effect that development may have on this site and ensuring that no significant accumulation of surface

water occurs as a result of inadequate canalization of storm water. Poor water control may almost certainly lead to subsidence related problems."

[17] On behalf of the defendants the second defendant testified as follows. He is the sole director of the first defendant and had purchased the property in 2016 at an auction for R160, 000. After seeing pictures of the property he had gone to the municipal offices and discovered that there were approved building plans for the property and also that the file contained a Van der Merwe Report. However, he did not bother to look at the plans and the Report. When he decided to sell the property he instructed an estate agent to market and sell the property together with the building plans. The second defendant testified that it was only in 2019 that he became aware of the contents of the Van der Merwe Report. He further testified that according to the Van der Merwe Report, the property is suitable to build two residential units subject to certain remedial action taken with regard to the foundation to be laid.

[18] The second defendant further testified that the first defendant conducts business in the property sector by buying and selling or renting out property. He testified that at the time the sale transaction was concluded with the plaintiff, he was a candidate attorney in the conveyancing law firm, Vorster Inc Attorneys, the transferring attorneys. He was the person within the law firm responsible for the transfer and registration of the property in the name of the plaintiff. The second defendant conceded that as he was employed in the department dealing with property transfers at Vorster Inc, he had specific knowledge in the purchasing and sale of immovable property. He also admitted that he had knowledge of the dolomitic stagnant conditions prevailing in the Centurion and Lyttleton areas.

[19] Under cross examination the second defendant further conceded that the plaintiff was never informed about the existence of the Van der Merwe Report nor its contents. With regard to the title deed to the property, the second defendant testified that he had never had regard to the title deed of the property as this was

with the bank which provided the bond. He further testified that even though the law firm he was working for were the transferring attorneys, he never had regard to the copy of the title deed which provides that:

"14. Subject to the following:

1. An engineer must be appointed before building plans are submitted, who must submit, together with the building plans, a certificate which states that he has studied the relevant geological report and that he has established the necessary measures with regard to building work, drainage of the buildings and the site and the installation of wet services so that the entire development is safe as far as possible from a geological point of view".

[20] In argument counsel for the plaintiff submitted that the defendant was liable for the return of the purchase price paid by the plaintiff in that the property was not appropriate for the purpose for which it was intended. With regard to the voetstoots clause on which the defendant relies in the case the finding is that the property had a latent defect at the time the contract was concluded, counsel submitted that in light, firstly, of the fact that the plaintiff had informed the defendants that she intended building a house on the property, and secondly, in light of the clause in the title deed and the Van der Merwe Report, it is clear that the defendants were aware that the property would not be suitable for the purpose it was intended for unless remedial action is taken, which information they failed to disclose to the plaintiff before the property was registered in her name.

[21] Counsel for the defendant argued for the dismissal of the plaintiff's claims on the ground that there is no evidence that the property has a latent defect such that a dwelling cannot be built. In the alternative it was argued that the defendants were not aware of the latent defect in the property and that in view of the

voetstoots clause in the contract and the first defendant did not warranty that the property would be fit for the purpose it was intended, the plaintiff could not succeed with her claim.

[22] A *voetstoots* clause in a contract of purchase and sale deprives the purchaser from cancelling the contract and claiming restitution if a latent defect is discovered after the contract is concluded. However, this defence is not available to a seller in the case where he or she was aware of the latent defect and failed to disclose it to the purchaser before the conclusion of the contract. In such a case the aedilitian remedies are available to the purchaser which include of relevance in this case the *actio redhibitoria*.

[23] In order to succeed with the *actio redhibitoria*, the plaintiff has to show on a balance of probabilities that:

23.1 The object sold had a defect which, viewed objectively, substantially impaired its utility for the purpose for which it was sold;

23.2 the defect existed at the time of the conclusion of the sale;

23.3 the defect was latent in the sense that it was not discoverable upon inspection;

23.4 the purchaser was unaware of the defect;

23.5 the purchaser would not have purchased the object had he or she known of the defect;

23.6 the purchaser is willing and able to effect restitution.

[24] It is common cause that at the time the plaintiff and the first defendant as represented by the second defendant, the plaintiff was unaware that the property on which she sought to build a residential dwelling had dolomitic issues and that certain remedial action needs to be performed for the stability of the structure built thereon in accordance with the recommendations contained in the Van der Merwe Report. It cannot therefore be disputed that at the time the purchase and sale contract was concluded the subject-matter of the sale, the property, had a latent defect.

[25] In her evidence the plaintiff has asserted that had she known of the latent defect and in view of her intention to build herself a house on the property, she would not have bought the property. Further, it is the plaintiff's evidence that at all material times the defendants were aware that she was purchasing the property for the purpose of building a house. This cannot be strenuously disputed by the defendant as the property was advertised for sale and it was indicated that it already had approved plans for double storey house.

[26] I found the plaintiff to be a credible and honest witness. Her evidence was coherent and logical on the critical points on the purpose for which she was buying the property and that she had informed the defendants of such an intention. It would have been expected that when the plaintiff made an offer to purchase the house and even at the time the contract was concluded, that the first defendant would have alerted the plaintiff of the dolomitic conditions and the existence of the Van der Merwe Report. I found the second defendant to be an evasive witness particularly when it came to whether he was aware of the Van der Merwe Report and the clause in the title deed dealing with what steps should be taken when the foundation of the house being built is laid. I found the second defendant's evidence about not being aware of the dolomitic conditions of the property not plausible when one takes into account that (i) he owns an entity in which he is the sole director and which conducts property transactions as its main operations; (ii) at the time the contract was concluded he worked in the

property division of his law firm and (iii) he is the person who actually processed the registration of the property into the name of the plaintiff, that he would not have been aware of the contents of the title deed and the Van der Merwe Report. Further it is improbable that the second defendant did not know that the plaintiff bought the property with the intention of building her house.

[27] I am of the view that the defendant fraudulently failed to disclose the latent defect in the property to the plaintiff and cannot now rely on the voetstoots clause in the contract.

[28] I am satisfied that, on a balance of probabilities, the plaintiff has proven that:

28.1 at the time she concluded that contract of sale she had every intention to build a house on it;

28.2 at the time the contract was signed the property had a latent defect;

28.3 due to the existing latent defect the property cannot be used for the purpose it was intended;

28.4 the first defendant was aware of the existence of the latent defect and intentional did not disclose it to the plaintiff; and

28.5 she is willing to make restitution.

[29] Accordingly, the following order is made:

1. The defendant to repay the sum of R600,000.00, being the purchase price, to the plaintiff;

2. The defendant to pay interest rate at 10.25% per annum on the aforementioned amount from the date the plaintiff and the third defendant entered into a mortgage bond;

3. The defendant to pay to the plaintiff the amount of R20,127.38 in respect of rates and taxes and any other municipal services paid to date in respect of the property;

4. The defendant to pay R17, 082.29 paid for transfer costs.

5. The defendant to pay the costs of this action.

NP MNGQIBISA-THUSI
Judge of the High Court

Date of hearing: 11 May 2022
Date of Judgment: 05 September 2023

Appearances
For Plaintiff: Adv Lia Kotze (instructed by Snyman De Jager Inc)
For Defendant: Adv Ane Raymond (instructed by Tintingers Inc)