



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other	YES/NO
Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: **A21/2021**

In the matter between:

GIDEON JAKOBUS PETRUS STEMMET

1st Appellant

ELAINE STEMMET

2nd Appellant

and

TSELISA JAMES MOKHETHI

1st Respondent

MMAKWALENG NAOMI MOKHETHI

2nd Respondent

CORAM:

MBHELE AJP, DAFFUE J *et* MATSHAYA AJ

HEARD ON:

07 FEBRUARY 2022

DELIVERED ON:

17 MARCH 2022

JUDGMENT BY:

MATSHAYA AJ

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 09:00 on 17 MARCH 2022.

INTRODUCTION

- [1] The appellants were the unsuccessful defendants in the Magistrate's Court sitting in Bloemfontein. They were held liable for fraudulent misrepresentation pertaining to latent defects in their former dwelling situated in Fichardtpark,

Bloemfontein that they sold to the respondents on 24 May 2013. The quantum of damages was eventually agreed upon in the amount of R128 423.26.

THE PARTIES

- [2] The appellants are a married couple and the previous co-owners of 19 Vergottini Street, Fichardtpark, Bloemfontein (the property). The respondents are the successful plaintiffs in the court *a quo* and the purchasers of the aforesaid immovable property.

THE APPEAL HEARING OF 8 OCTOBER 2021

- [3] This appeal first served before Daffue J and myself on 8 October 2021 but during the post hearing meeting it turned out that we had divergent views hence the matter was enrolled before the full bench.

FACTUAL BACKGROUND

- [4] The appellants entered into a deed of sale in terms of which they sold their immovable property to the respondents for an agreed purchase price of R1 290 000. The said property was registered on the respondents' names on 22 July 2013 after which they moved in. They continued to enjoy the property without any problems until approximately a year later when the main bedroom door started jamming. Then cracks started developing all over the house and developed wider into structural cracks.
- [5] On 24 June 2014, the first respondent lodged an accidental claim for the defects on the house with Absa bank (Absa) where the property was insured. Absa repudiated the claim through a letter (the Absa letter) addressed to the first respondent dated 12 August 2014. In part, the said letter reads as follows:
- "On inspection by the assessor it was found that the damages are due to active clay and it was previously patched, the damage was deemed old and gradual."*

[6] Subsequent to the Absa letter, the first respondent employed the services of professional civil engineers to investigate the cause of the defects on the property. Mr Kempff inspected the property on 2 occasions. First towards the end of August and again during September 2014 and prepared a report dated 30 September 2014 pertaining to his observations and findings that he furnished to the first respondent. In the said report, he concluded that:

[6.1] *"The soil materials occurring next to and underneath the foundation consists of moderate clay;*

[6.2] *It should be noted that cracks had been previously repaired, however it is clear that the cause of the cracking has not yet been dealt with as the cracks occur again;*

[6.3] *It may be concluded that a portion of the foundation is rotating (north side);*

[6.4] *We are of the opinion that the underpinning done previously was not successful and may lead to more costly alterations/repairs to the property."*¹

THE JUDGMENT OF THE COURT A QUO

[7] Pertaining to the special plea of prescription, the court *a quo*, relying upon the judgments of **Truter and Another v Deyssel**,² **Anglorand Securities Ltd v Mudau and Others**³ and **Evins v Shield Insurance Co Ltd**,⁴ held that the appellants failed to establish that the respondents had actual or constructive knowledge of the debt on/or before 26 July 2014. (They received the letter from ABSA Insurance, to which I shall refer later herein again, on 12 August 2014 and thus inside the period of three years prior to institution of the action).⁵ It reasoned further, that the respondents only became aware of the debtor upon receipt of the Absa letter on 12 August 2014 and that is the date upon which prescription started to run.

[8] Regarding the merits of the claim, it held that the evidence of the respondents' expert witnesses was unchallenged on all material aspects, that the second appellant, Mrs Stemmet, (incorrectly referred to as first defendant) was not a reliable witness as she *"made her case as the matter progressed."* Consequently, the court *a quo* was satisfied that the respondents proved on a balance of

¹ See conclusions, page 1 of the report, page 65 of the bundle.

² 2006 (4) SA 168 (SCA).

³ [2011] ZASCA 76.

⁴ 1980 (2) SA 814 (A).

⁵ Volume 6: judgment, paras 72 -79 at pp 866 – 868.

probabilities that the appellants were aware of the latent defects on the property and that they went to great lengths to conceal the cracks by filling them with plaster and painting over them.⁶

THE GROUNDS OF APPEAL

[9] The notice of appeal⁷ is confusing. It consists of 35 numbered paragraphs that are not only repetitive but difficult to comprehend.

[10] It is perhaps convenient to quote the heads of argument of appellants' counsel *verbatim*:⁸

"6. *In a nut shell the grounds for appeal relate thereto that:*

6.1 *The court a quo erred in concluding that respondents have made out a case for the relief sought and that the appellants did not have knowledge of and did not conceal the defects and absolving them from liability in terms of the voetstoets clause. (Note: The vital words "and erred in not concluding" was mistakenly left out by counsel pertaining to appellants' alleged lack of knowledge if paragraph 10 of the grounds of appeal is considered).*

6.2 *The court a quo erred in not finding that the claim had become prescribed.*

6.3 *Lastly, the rejection of the evidence of the 2nd appellant."*

ASSESSMENT OF EVIDENCE ON APPEAL

[11] It is trite that when an appeal is lodged against a trial court's findings of fact, the appeal court takes into account that the trial court was in a more favourable position than itself to form a judgment because it was able to observe witnesses during their questioning and was absorbed in the atmosphere of the trial from start to finish.⁹

[12] The comment in the previous paragraph must be seen in perspective as an appeal court may, with the benefit of an overall conspectus of the full record, often be in a better position to draw inferences, particularly with regard to

⁶ Volume 6: judgment, paras 106 - 108 at pp 876 -877.

⁷ Volume 6, page 878-886.

⁸ Paragraph 6 of the heads of argument.

⁹ Schmidt & Rademeyer, Law of Evidence, Lexisnexis at para 3 3. See also R v Dhlumayo 1948 (2). SA 677 (A) para 3 and 4 and the exposition by Ponnar JA in S v Monyane and Others 2008 (1). SACR 543 (SCA) at para 15.

secondary facts.¹⁰ An appeal court may also differ from the court *a quo* when it appears from the record and the reasons for the judgment that a witness was misunderstood or where favourable credibility findings are not borne out by the record. An over-emphasis of the trial court's advantages must be avoided as this may lead to an illusory right of appeal.¹¹

FACTS NOT IN DISPUTE

[13] The following facts are not in dispute:

[13.1] The appellants purchased the property in 2005 and had been staying there for eight years until 2013 when they sold it to the respondents. Two deeds of sale were signed by the parties in respect of the property the first concluded on 17 February 2013 and the second and relevant one on 24 May 2013. The respondents visited the property on two occasions before they eventually signed the second offer to purchase.

[13.2] The first deed of sale was cancelled for a reason irrelevant to the present dispute, but on 22 July 2013 the respondents obtained registration of transfer on their names consequent upon the second deed of sale whereupon the respondents took occupation of the property.

[13.3] As a result of several cracks appearing on the walls of the property and other defects, the respondents filed a claim for "*accidental damage*" with ABSA on 24 June 2014 that was repudiated through a letter dated 12 August 2014.¹² It read as follows:

"On inspection by the assessor it was found that the damages are due to active clay and it was previously patched, the damage was deemed old and gradual."

[13.4] Two experts testified on behalf of the respondents, to wit Mr W. Kruger, a consulting engineer and Mr C.N. Kempff, a registered civil engineer. The evidence pertaining to the nature of the cracks, that the dwelling house was built in clay, that underpinning of the foundation of the house

¹⁰ *Louwrens v Oldwage* 2006 (2) SA 161 (SCA) at para 14.

¹¹ *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) para 5.

¹² Volume 1, p 63.

was performed at a stage, that cracks had been filled and painted over from time to time was not contradicted.

THE DISPUTED ASPECTS

[14] The following aspects were in dispute during the hearing:

[14.1] Whether the respondents' claim had prescribed at the time that they instituted action against the appellants;

[14.2] When were the repairs undertaken to the property as testified to by both second appellant and first respondent?

[14.3] Although no direct evidence was presented on behalf of the respondents pertaining to the appellants' knowledge of latent defects, that the appellants were aware thereof and that they designedly and *dolo malo* concealed their existence from the respondents and/or refrained from informing them thereof. It is the respondents' case that the probabilities favour positive findings in this regard.

[14.4] Whether the appellants could rely on the *voetstoots* clause contained in the deed of sale based on their fraudulent misrepresentation.

LEGAL PRINCIPLES

Prescription

[15] **Section 12(3) of the Prescription Act¹³** is at the heart of this matter. It can delay prescription in certain circumstances. It reads as follows:

"A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

¹³ No. 68 of 1969.

[16]

[16.1] In **Truter and Another v Deyssel**,¹⁴ the court held that:

"A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or...." (emphasis added).

[16.2] In **Minister of Finance and Others v Gore NO**,¹⁵ the Supreme Court of Appeal restated the legal position in the following terms:

"This Court has, in a series of decisions, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case 'comfortably'." (emphasis added).

[16.3] See also **Macleod v Kweyiya**¹⁶ where the following was stated:

"In order to successfully invoke s 12(3) of the Prescription Act, either actual or constructive knowledge must be proved. Actual knowledge is established if it can be shown that the creditor actually knew the facts and the identity of the debtor... The test is what a reasonable person in his position would have done, meaning that there is an expectation to act reasonably and with the diligence of a reasonable person. A creditor cannot simply sit back and 'by supine inaction arbitrarily and at will postpone the commencement of prescription'. What is required is merely the knowledge of the minimum facts that are necessary to institute action and not all the evidence that would ensure the ability of the creditor to prove its case comfortably." (emphasis added).

[16.4] In **Links v Member of Executive Council, Department of Health, Northern Cape**¹⁷, the Constitutional Court held as follows:

"... Until there are reasonable grounds for suspecting fault so as to cause the plaintiff to seek further advice, the claimant cannot be said to have knowledge of the facts from which the debt arises."

¹⁴ Supra, para 16.

¹⁵ 2007 (1) SA 111 (SCA) para 17.

¹⁶ 2013 (6) SA 1 (SCA) para 09.

¹⁷ 2016 (4) SA 414, paras 42 and 45.

“ *In a claim for delictual liability based on the Aquilian action, negligence and causation are essential elements of the cause of action. Negligence and, as this court has held, causation have both factual and legal elements. Until the applicant had knowledge of facts that would have led him to think that possibly there had been negligence and that this had caused his disability, he lacked knowledge of the necessary facts contemplated in in s 12(3).*” (emphasis added).

The evidentiary burden on prescription

- [17] It is trite that a defendant (appellants in this case) bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff (respondents in this instance) obtained actual or constructive knowledge of the debt. The burden shifts to the plaintiff only if the defendant has established a prima facie case.¹⁸

ANALYSIS

- [18] On the aspect of prescription, counsel for the appellants strongly submitted that prescription started to run on 24 June 2014 when the first respondent lodged a claim with Absa and or even before that as soon as they noticed the cracks developing. She referred to the first respondent’s testimony that the bedroom door started jamming and that numerous structural cracks developed. She sought to place some reliance on the fact that the first respondent is a qualified civil engineer himself and therefore, ought to have realised even before lodging the Absa claim that those damages were latent defects that were actionable. To buttress this point, she referred to the first respondent’s testimony that the house was falling apart and concluded by submitting that the trial court erred by dismissing the appellants’ special plea of prescription.
- [19] To counter this argument, counsel for the respondents submitted that the respondents only became aware of the latent defects which would form the basis of an action on 12 August 2014 when they received the Absa letter and therefore, their claim had not yet prescribed at the time when summons were issued on 27 July 2017.

¹⁸ See *Gericke v Sack* 1978 (1) SA 821 (A) 827D-E.

[20] To determine this aspect, I have to revert to the evidence that is on record. The submissions that were put forward by the appellants are not supported by objective facts that appear from the record particularly during the testimony of the first respondent if regard is had to the following:

[20.1] Firstly, the first respondent consistently testified that even though he observed cracks over a period of time which he described as structural, he did not know the cause thereof;

[20.2] Secondly, the above testimony finds credence from the fact that he lodged a claim with Absa that was described as 'accidental damage';

[20.3] Thirdly, when he received the repudiation letter from the insurer, that was when it dawned to him that there was previous patchwork on some of the cracks which was concealed by painting. In view of these objective facts, coupled with the Absa letter that was not challenged by the appellants, the conclusion becomes irresistible that at-least as on 24 June 2014 the respondents had not yet acquired the required minimum facts on which they could base their claim, if any.

[21] Even if we were to accept for a moment that on 24 June 2014 they were aware of structural damages, the Absa letter acted as an eye opener to them, that there was something wrong with the property, in my view, still they would not at that stage have acquired minimum facts on which to base their claim and would also not have known the identity of the debtor in view of the following:

[21.1] Without Mr Kempff's report, they would not have known that the underlying cause of the defects is the clay soil on which the property is built;

[21.2] They would not have known that the cracks were a mere symptom of the underlying problem;

[21.3] They would not have known that there were cracks that were repaired previously and concealed and painted;

[21.4] They would not know against whom to institute action, the insurer, the appellants, the previous owners before the appellants or any other builder who may have worked on the property before.

[22] To lay credence to the above view, it is important to refer again to the testimony of the first respondent and understand his answers within the context of the issues in this case. He was asked if at the time that he took the photos he was aware of the cause of the cracks and he responded:

"No, Your Honour, absolutely not. Hence I took the effort that I did. I did not know what was causing it and even in this photo report I did not even suggest why this was happening..."

[23] Then he was asked the following questions:

Q *"...what caused you then to approach Absa Bank and not from the start approach an engineer to give you a report?"*

A *"What came to my mind, Your Honour, was that look this is bonded house by Absa and therefore I need to inform them that these are the problems that I am encountering with this house."*

Q *"Okay and what did you want to get out of this?"*

A *"It was basically just for them to come and repair it."*

Q *"Why did you not when you observed these cracks from that, at that time issue summons against the first and second defendants?"*

A *"...in terms of chronology of events, after this I approached Absa and then Absa rejected my claim. And indicating that in terms of the assessor that it looks like it was previously patched. It is then that I went to get a professional opinion from a professional engineer."*

[24] To me the above answers clearly indicate that all along he did not suspect any fraudulent misrepresentation by the appellants which would have made him acquire the required minimum facts for prescription to start counting.

[25] In line with the chronology of events as alluded to above, the first respondent only received Mr Kempff's report on 30 September 2014 that clearly outlined to him the nature of problems on the property. To me, this is the time that prescription started running.

- [26] The submission by the appellants' counsel that the first respondent should have been aware that these cracks were latent defects because he is an engineer himself has no merit for various reasons. Firstly, this reasoning is informed firstly, by the fact that even though the first respondent is a qualified engineer, he never practised as such. This is where the analogy by respondents' counsel in the court a quo finds relevance that "...the fact that I am a legally qualified person does not mean that I can successfully advise someone on labour law.....the fact that the first plaintiff is a qualified civil engineer does not make him an expert on defects of this nature. And he testified to that effect."
- [27] Secondly, from the facts of this case, it took the expertise of 2 experienced practising civil engineers to diagnose and discover that there were latent defects on the respondents' property. All that the first respondent was observing was mere structural cracks without any knowledge or suspicion that they may be latent defects. To me, it would be absurd to suggest that the first respondent should have known earlier than 24 June 2014 that these were latent defects for the mere reason that he is a qualified engineer more so it never dawned to him to dig and look for underpinnings.
- [28] Perhaps it warrants emphasis to state that the test on prescription for purposes of section 12(3) is not when the plaintiff should have acquired knowledge of the minimum facts. Instead, the correct legal position as supported by case law above is when did the plaintiff (in this instance the respondents) acquire the minimum facts required for him/her to institute action. Consequently, the argument by the appellants on the issue of prescription cannot be sustained for lack of merit. Therefore, the appeal ought to fail on this ground alone. (underlining my emphasis).

The alleged fraudulent misinterpretation

[29]

[29.1] In **Knight v Trollip**,¹⁹ Selke J put the matter as follows:

" I think it resolves itself to this, that here the seller could be held liable only in respect of defects of which he knew at the time of the making of the contract, being defects

¹⁹ 1948 (3) SA 1009 (D), at 1013.

of which the purchaser did not then know. In respect of those defects, the seller may be held liable where he has designedly concealed their existence from the purchaser, or where he has craftily refrained from informing the purchaser of their existence. In such circumstances, his liability is contingent on his having behaved in a way which amounts to a fraud on the purchaser, and it would thus seem to follow that, in order that the purchaser may make him liable for such defects, the purchaser must show directly or by inference, that the seller actually knew."

[29.2] In **Van der Merwe v Meades**,²⁰ it was held that a seller will be deprived of the protection afforded by a voetstoets clause where the purchaser can prove that the seller (1) was aware of a defect in the merx at the time of the making of the contract and (2) dolo malo conceals its existence from the purchaser with the intention of defrauding the purchaser.

[29.3] In **Banda and Another v Van Der Spuy and Another**,²¹ Swain AJA (as he then was) aptly put the matter pertaining to the subject of latent defects as follows:

"It is trite that a seller is liable for all latent defects which render the res vendita unfit, or partially unfit, for the purpose for which it was intended to be used.... A leaking roof is a latent defect which renders the house unfit for habitation. The respondents were aware of one of the causes for the leaking roof, namely inadequate roof design, which resulted in the sagging of the roof, which had not been permanently repaired and which they had concealed.... Their fraudulent conduct in concealing the existence of the defective, leaking roof forfeits the protection of the voetstoets clause in respect of this latent defect."

[30] On this aspect of alleged fraudulent misrepresentation, counsel for the appellants pursued their pleaded case that there were no defects on property and/or if there were any, they were not within their knowledge and/or further, if there were any patent defects they were bare for the respondents to see when they viewed the property twice prior to the purchase.

[31] It is common cause that the appellants never informed the respondents of the existence of any cracks on the property. Astonishingly, it seems from the record

²⁰ 1991 (2) SA 1 (A).

²¹ 2013 (4) SA 77 (SCA) para24.

that during the trial, the second appellant sought belatedly, to introduce evidence of cracks through photos (exhibit D) that were allegedly on the property when the respondents viewed the property prior to the sale. These photos depict cracks that she alleged were the subject of repairs on the Pro-build quotation. The court *a quo* dismissed these on the reasoning that the second appellant made her case as the matter progressed. In my view, the court *a quo* cannot be faulted for the above finding because it is apparent from the record that the first respondent was never confronted about them during cross examination and there was no plausible explanation for such crucial omission.

[32] During the hearing of this appeal, counsel for the appellants was invited to comment on the undisputed testimony of the first respondent, that when they viewed the property for the first time there were renovations in progress on the property and that the second appellant told the estate agent, Willem in Afrikaans that she had told him not to bring people until they were done. She was caught wanting on her response.

[33] The respondents led evidence of 2 experts which was never controverted by the appellants. Their evidence is crucial if one has regard to the probabilities in this case. The fact that there was under-pinning on the foundation of the property is an indication that there was a previous problem of cracks as a result of the clay soil on which the property was built. According to Mr Kempff, this under-pinning was not effective to prevent them from re-occurring. From this evidence, it can easily be inferred that one of the previous owners (be it appellants or those before them) must have constructed the under-pinning in an attempt to prevent the re-emergence of the cracks. This is where the conclusions by Mr Kempff become relevant that it was unlikely that during the 8 years that the appellants' stayed in that property no cracks ever developed and they never painted the property.

[34] Further, that there were previous cracks that were repaired is another indication that one of the previous owners had a problem of cracks on the property. This in a way supports Mr Kempff's opinion that cracks would develop in that house on a one or two or three year period. I accept that indeed the appellants may

not have not known the soil type on which the house is built, however, from the objective facts presented during the trial, it would be highly improbable that cracks never developed during the 8 years of their stay on the property. On a balance of probabilities, the respondents passed the required threshold on the standard of proof that the second appellant's version was highly improbable in the circumstances as the court *a quo* correctly found. This leads to one conclusion that they deliberately omitted to inform the respondents about the existence of the latent defects particularly cracks, so as to induce them to purchase the property.

- [35] The first respondent described the property as neat and ready for occupation and that no renovations were needed. That is how the property was advertized on Property 24 with a newly renovated kitchen. He also testified that the paint looked new and would not have bought the property had he been informed about the defects.

CONCLUSION

- [36] For the reasons outlined above, there is no reason to tamper with the court *a quo*'s order that dismissed the appellants' special plea of prescription and the appeal on this ground ought to fail with costs. Pertaining to the merits of the matter, the court *a quo* correctly found in favour of the respondents that the appellants deliberately omitted to inform them about the latent defects and for this reason, they cannot find refuge under the *voetstoets* clause. Therefore, the appeal on this ground should fail too, with costs.

COSTS

- [37] Firstly, there is the aspect of the wasted costs occasioned by the pre-mature enrolment of this matter before this court on 10 May 2021 before the aspect of *quantum* could be finalised before the court *a quo*. The appellants should be held liable for them. Secondly, there is the issue of costs of 8 October 2021 when the matter served before the two (2) member's bench. These should be costs in the appeal. Lastly, the costs of this appeal should follow the successful party.

[38] Before I pronounce the order, it would be remiss of me not to lament on the period that the trial magistrate took to furnish his reasons in terms of **Rule 51(1)**.²² The said Rule provides that “Upon a request in writing by any party within 10 days after judgment and before noting an appeal the judicial officer shall within 15 days hand to the registrar or clerk of the court a judgment in writing which shall become part of the record....”

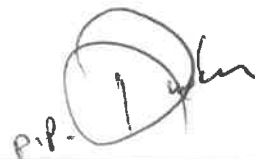
[39] The Honourable **Justice D H Lloyd** remarked as follows during the Judicial Conference of Australia on 7 November 1998:

“A judge’s tardiness in completing his judicial task after a trial is over, denies justice to the winning party during the period of the delay. It also undermines the loser’s confidence in the correctness of the decision when it is eventually delivered. Litigation causes quite enough stress, as it is, for people to have to endure while a trial is going on. Compelling them to await judgment for an indefinitely extended period after the trial is over will only serve to prolong their anxiety, and may well increase it. Conduct like this weakens public confidence in the whole judicial process. Left unchecked it would be ultimately subversive of the rule of law. Delays on this scale cannot and will not be tolerated. A situation like this must never occur again.”

[40] It is apparent from the record that reasons for judgment were furnished by the magistrate almost 4 months after the request.²³ I am not imputing any blame on him for the delay because this could have been as a result of a systemic problem. That is why magistrates who are heads of offices are enjoined to ensure that a Rule 51 register is properly kept and monitored to avoid delays like this one.²⁴ Undoubtedly, there are noble reasons for these legislative prescripts for example, to enable an aggrieved party to prosecute its appeal and assert its rights promptly.

ORDER

[41] The appeal is dismissed with costs.



M.M. MATSHAYA AJ

²² Rules of the Magistrate’s Court.

²³ See page 844-5 of the bundle.

²⁴ See paras 24.1(i) & (ii) read with paras 24.2(i) & (ii) of the Judicial Manual for the lower courts.

I concur



N.M. MBHELE AJP

INTRODUCTORY REMARKS

[42] This is a minority judgment. I have had the advantage of reading the majority judgment, but am unfortunately not in agreement therewith pertaining to the issue of prescription for the reasons that will become clear in due course.

THE APPEAL HEARING OF 10 MAY 2021

[43] Reference is made in paragraph 37 of the majority judgment to the appeal hearing of 10 May 2021. As I was involved that day, I believe that it is necessary to give some background in order to justify the order of wasted costs to be made. The matter came before Acting Deputy Judge President Naidoo and me. At that stage the orders of the court *a quo* read as follows:

- “1. That the Defendants’ special plea, in relation to prescription of Plaintiffs’ claim, is dismissed.
2. That the Plaintiffs succeed on the merits for such damages as they can prove.
3. That the Defendants pay the costs, including Counsel’s fees.”

[44] We were of the view that the orders were not appealable insofar as there was yet a pronouncement to be made on the *quantum* of the claim. Therefore, the following orders were granted:

- “1. The appeal is struck from the roll.
2. Leave is granted to both parties to enrol the matter for arguments and consideration of costs, after final determination of the quantum of the respondents’ claim in the Magistrate Court and upon the following conditions:
 - 2.1 If any of the parties appeal the judgement of the Magistrate Court, the aforesaid enrolment in respect of costs shall coincide with the hearing of the appeal.

2.2 If no appeal is lodged against the judgement of the Magistrate Court within the prescribed time limit, either party shall be entitled to enrol this matter for costs to be determined, after giving 20 (twenty) days' notice to the other party.”(emphasis added)

- [45] Since then the parties came to an agreement pertaining to the *quantum* of the claim and the court *a quo* made the agreement an order of court. The authorities are clear. A magistrate's order in favour of a plaintiff on the issue of liability only where the issues of merits and *quantum* have been separated is not appealable.²⁵
- [46] Although the respondents' counsel decided to deal extensively in his main heads of argument with the issue of prescription in the first 15 pages, he nevertheless made some submissions pertaining to appealability of the order on pages 16 to 19 of the heads of argument where after he proceeded with submissions on the merits in another 22 pages. In hindsight this was really unnecessary, but in my view cannot have a bearing on the award to be made.
- [47] The appellants should never have appealed the order of the court *a quo* and thereafter set the matter down for hearing of the appeal. The aforesaid authorities are not only clear, but also well-established over decades. Consequently, they should be ordered to pay the wasted costs pertaining to the appeal hearing on 10 May 2021.

THE JUDGMENT OF THE COURT *A QUO*

- [48] Over and above what is stated in the majority judgment, I deem it apposite to quote the following conclusion arrived at by the court *a quo* in this regard:
- “In June 2014, the Plaintiffs had no knowledge that the cracks on the property were old and gradual, previously patched and caused by active clay soil and this is the bases (sic) on which this claim has been instituted against the Defendants.”²⁶

²⁵ See s 83(b) of the Magistrates' Courts Act, 32 of 1984; *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532 J – 533 B; *Steenkamp v South African Broadcasting Corporation* 2002 (1) SA 625 (SCA) paras 13, 14 – 16 & *Jordaan v Bloemfontein Transitional Local Authority and Another* 2004 (3) SA 371 (SCA) paras 15 & 16

²⁶ Volume 6: judgment, para 78 at p 868

FACTS NOT IN DISPUTE

[49] I do not intend to repeat all undisputed facts, either as mentioned in the majority judgment or appearing from the record, but need to emphasise that except for some minor repairs undertaken by the appellants before the final deed of sale was concluded, their dwelling house and garden were in a neat condition during the two inspections prior to the sale.

RELEVANT AUTHORITIES PERTAINING TO PRESCRIPTION

[50] The majority judgment does not deal with the following further judgments of the Supreme Court of Appeal and the Constitutional Court, which I deem relevant in the present circumstances. I shall give a brief exposition of the facts and legal conclusions in respect of each:

50.1 *Fluxmans Inc v Levenson*²⁷ - In this judgment the attorney's client entered into an oral contingency fees agreement which provided for exorbitant fees. The client's version in court was that he had since the agreement ascertained, having been so advised by his present legal representative, that this agreement was invalid as it did not comply with the provisions of the Contingency Fees Act.²⁸ He complained that he was a layman and that he was only afterwards informed of the judgments of the Constitutional Court. Having held that the agreement between the parties did not comply with the peremptory requirements of s 3 of the aforesaid Act and was therefore invalid, the court held as follows:

"The question, therefore, is whether before February 2014 the respondent had knowledge of the facts from which his claim arose. In my view, the respondent did have knowledge of such facts. Immediately after he paid the fees to the appellant on 20 August 2008 the respondent knew all the facts even though he did not know the legal conclusion flowing from those facts. The respondent knew that fees which he paid to the appellant on 20 August 2008 were calculated on the basis of the oral contingency fees agreement which he concluded with the appellant (Perlmán). On his own evidence, the respondent then also knew all the other facts that he relied upon

²⁷ 2017 (2) SA 520 (SCA)

²⁸ *Ibid* para 35 and Act 66 of 1997; *Ibid* paras 35 & 41

in his founding affidavit for the conclusion that the contingency fees agreement was invalid. ...”

The court continued as follows in the next paragraph:²⁹

“Knowledge that the relevant agreement did not comply with the provisions of the Act is not a fact which the respondent needed to acquire to complete a cause of action and was therefore not relevant to the running of prescription. This court stated in *Gore NO* para 17 that the period of **prescription begins to run against the creditor when it has minimum facts that are necessary to institute action**. The running of **prescription is not postponed until it becomes aware of the full extent of its rights nor until it has evidence that would prove a case 'comfortably'**. The 'fact' on which the respondent relies for the contention that the period of prescription began to run in February 2014, is **knowledge about the legal status** of the agreement, which **is irrelevant** to the commencement of prescription. It may be that before February 2014 the respondent did not appreciate the legal consequences which flowed from the facts, but his failure to do so did not delay the date on which the prescription began to run. ... **That the contingency fees agreements such as the present one, which do not comply with the Act, are invalid is a legal position that obtained since the decision of this court in *Price Waterhouse Coopers Inc* and is therefore not a fact which the respondent had to establish in order to complete his cause of action. Section 12(3) of the Prescription Act requires knowledge only of the material facts from which the prescriptive period begins to run — it does not require knowledge of the legal conclusion (that the known facts constitute invalidity) (*Claasen v Bester* 2012 (2) SA 404 (SCA) ([2011] ZASCA 197)).**” (emphasis added)

50.2 *Claasen v Bester*³⁰ - A layman and farmer in financial difficulties whose farm was on the verge of being sold by public action, entered into an agreement with a relative who offered to buy the farm on condition that he may buy back the farm in future. The specific clause in the deed of sale was held to be vague insofar as no price was determined at which the farm might be bought back. The Court of Appeal held that, notwithstanding the farmer's belief that the contract and particularly the specific provision was enforceable, this was irrelevant as the knowledge of legal conclusions is not required before prescription begins to run. I quote from the judgment:³¹

²⁹ *Ibid* para 42

³⁰ 2012 (2) SA 404 (SCA)

³¹ *Ibid* paras 15 & 16

- [15] These cases clearly do not leave open the question posed and not answered in *Van Staden*. They make it abundantly clear that knowledge of legal conclusions is not required before prescription begins to run. There is no reason to distinguish delictual claims from others. The principles laid down have been applied in several cases in this court, including most recently *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA) ([2009] 3 All SA 475) para 37 where Leach AJA said that if the applicant 'had not appreciated the legal consequences which flowed from the facts' its failure to do so did not delay the running of prescription. See also *ATB Chartered Accountants (SA) v Bonfiglio* [2011] 2 All SA 132 (SCA) paras 14 and 18.
- [16] It is thus clear that **prescription began to run on 3 March 2004, when Bester knew that no provision as to the price at which he could buy back the farm from Claasen had been included in the deed of sale.** That he believed nonetheless that the provision was enforceable is not relevant. And attempts to register the 'special conditions' in the deed of sale against the title deeds by the legal representatives of both parties are also of no consequence." (emphasis added)

50.3 *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng*³² - Leach AJA (as he then was) held that if the appellant "had not appreciated the legal consequences which flowed from the facts" its failure to do so did not delay the running of prescription.

50.4 In *Mtokonya v Minister of Police*,³³ one of two judgments handed down in 2018 by the Constitutional Court, the applicant submitted that a special plea of prescription should not be upheld by alleging that he did not know that the conduct of the police in not bringing him before a court of law within 48 hours following upon his arrest was wrongful and actionable. The Constitutional Court reiterated that s 12(3) of the Prescription Act refers to the facts from which the debt arises and does not require knowledge of legal opinions or legal conclusions or the availability in law of a remedy. The Constitutional Court referred to *Claasen v Bester*, *Yellow Star Properties v MEC*, *Truter and Another v*

³² 2009 (3) SA 577 (SCA) para 37

³³ 2018 (5) SA 22 (CC)

Deyssel, the *Gore* judgment and *Fluxmans Inc v Levenson* with approval in its detailed exposition of the legal position.³⁴ The Constitutional Court specifically held that the applicant's reliance on *Shange and Macleod* was misplaced. Its unambiguous exposition of the law of prescription and final conclusions need to be quoted in full:³⁵

"[63] Furthermore, to say that the meaning of the phrase '*knowledge . . . of the facts from which the debt arises*' includes knowledge that the conduct of the debtor giving rise to the debt is wrongful and actionable in law would render our law of prescription so ineffective that it may as well be abolished. I say this because prescription would, for all intents and purposes, not run against people who have no legal training at all. That includes not only people who are not formally educated but also those who are professionals in non-legal professions. However, it would also not run against trained lawyers if the field concerned happens to be a branch of law with which they are not familiar. The percentage of people in the South African population against whom prescription would not run when they have claims to pursue in the courts would be unacceptably high. In this regard it needs to be emphasised that the meaning that we are urged to say is included in s 12(3) is not that a creditor must have a suspicion (even a reasonable suspicion, at that) that the conduct of the debtor giving rise to the debt is wrongful and actionable but we are urged to say that a creditor must have knowledge that such conduct is wrongful and actionable in law. If we were asked to say a creditor needs to have a reasonable suspicion that the conduct is or may be wrongful and actionable in law, that would have required something less than knowledge that it is so and would not exclude too significant a percentage of society." (emphasis added)

50.5 In *Loni v MEC for Health, Eastern Cape*³⁶ the Constitutional Court emphasised that the facts in this judgment are entirely distinguishable from the facts in *Links*. The Constitutional Court held that the applicant should have suspected fault on the part of the hospital staff over time, bearing in mind that he was discharged for a second time from hospital during July 2001, but at that stage was still experiencing pain in his leg and was limping. Even though he was given his hospital file then, he

³⁴ *Ibid* at paras 37 - 51

³⁵ *Ibid* at para 63

³⁶ 2018 (3) SA 335 (CC)

only consulted medical practitioners in 2008 where after action was instituted. I quote the following from the judgment:

[32] The **objective assessment**, which was appropriately applied by both courts, established that a **reasonable person in the position of the applicant would have realised that the treatment and care which he had received were substandard** and were not in accordance with what he could have expected from medical practitioners and staff acting carefully, reasonably and professionally ...

[34] When the principle in *Links* is applied to the present facts, the applicant should have over time suspected fault on the part of the hospital staff. There were sufficient indicators that the medical staff had failed to provide him with proper care and treatment, as he still experienced pain and the wound was infected and oozing pus. With that experience, he could not have thought or believed that he had received adequate medical treatment. Furthermore, since he had been given his medical file, he could have sought advice at that stage. There was no basis for him to wait more than seven years to do so. His explanation that he could not take action as he did not have access to independent medical practitioners who could explain to him why he was limping or why he continued to experience pain in his leg, does not help him either. The applicant had all the necessary facts, being his personal knowledge of his maltreatment and a full record of his treatment in his hospital file, which gave rise to his claim. This knowledge was sufficient for him to act. This is the same information that caused him to ultimately seek further advice in 2011.

[35] It is clear that long before the applicant's discharge from hospital in 2001 and certainly thereafter, the applicant had knowledge of the facts upon which his claim was based. He had knowledge of his treatment and the quality (or lack thereof) from his first day in hospital and had suffered pain on a continuous basis subsequent thereto. The fact that he was not aware that he was disabled or had developed osteitis is not the relevant consideration."

[51] Having dealt with authorities not relied upon in the majority judgment, I shall now briefly deal with the judgments relied upon in the majority judgment.

51.1 I firstly deal with *Truter and Another v Deyssel*.³⁷ A special plea of prescription was upheld in the Supreme Court of Appeal. The High Court dismissed the special plea and held that a surgical procedure

³⁷ 2006 (4) SA 168 (SCA)

was performed on the plaintiff, Deyssel, by an ophthalmologist during 1993, but he only received so-called favourable expert medical opinion about negligence in 2000 and therefore, prescription commenced running only at that stage. The Supreme Court of Appeal clearly stated that in a delictual claim the requirements of fault and unlawfulness do not constitute factual ingredients of the cause of action, but are legal conclusions to be drawn from the facts. I quote:

"[17] In a delictual claim, the requirements of fault and unlawfulness do not constitute *factual* ingredients of the cause of action, but are *legal* conclusions to be drawn from the facts:

'A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault.'

[19] 'Cause of action' for the purposes of prescription thus means '... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

[20] As contended by counsel for Drs Truter and Venter, **an expert opinion that a conclusion of negligence can be drawn from a particular set of facts is not itself a fact, but rather evidence. As indicated above, the presence or absence of negligence is not a fact; it is a conclusion of law to be drawn by the court in all the circumstances of the specific case. Section 12(3) of the Act requires knowledge only of the material facts from which the debt arises for the prescriptive period to begin running - it does not require knowledge of the relevant legal conclusions (ie that the known facts constitute negligence) or of the existence of an expert opinion which supports such conclusions.**"³⁸ (emphasis added)

51.2 *Minister of Finance and Others v Gore NO*³⁹ - The Supreme Court of Appeal pointed out that "the statutory prescription periods are meant to protect defendants from undue delay by litigants who are laggard in enforcing their rights."⁴⁰ In that case the court held the following about the knowledge of Mr Rabie who testified on behalf of the unsuccessful tenderer that formed an opinion that fraud had been committed:

³⁸ *Ibid* paras 17, 19 & 20 to be read with paras 24 and 26

³⁹ 2007 (1) SA 111 (SCA)

⁴⁰ *Ibid* para 16

- [18] Rabie certainly did cry fraud soon after 3D-ID lost the tender. But what did he know when he did so? The defendants' argument seems to us to mistake the nature of 'knowledge' that is required to trigger the running of prescriptive time. Mere opinion or supposition is not enough: there must be justified, true belief. Belief, on its own, is insufficient. Belief that happens to be true (as Rabie had) is also insufficient. For there to be knowledge, the belief must be justified.
- [19] It is well established in our law that:
- (a) Knowledge is not confined to the mental state of awareness of facts that is produced by personally witnessing or participating in events, or by being the direct recipient of first-hand evidence about them.
 - (b) It extends to a conviction or belief that is engendered by or inferred from attendant circumstances.
 - (c) On the other hand, mere suspicion not amounting to conviction or belief justifiably inferred from attendant circumstances does not amount to knowledge. It follows that belief that is without apparent warrant is not knowledge; nor is assertion and unjustified suspicion, however passionately harboured; still less, is vehemently controverted allegation or subjective conviction.
- [20] What Rabie knew, in essence, was that only 3D-ID's technology could meet the demanding tender specifications. When 3D-ID did not win the award he suspected that something must have been amiss in the tender process. His conviction was strengthened by two calls he received: ... From this, he inferred, with passionate certainty, that fraud must have taken place; but he lacked a firm evidentiary basis for his belief."⁴¹

The court concluded as follows pertaining to the unsuccessful special plea of prescription:⁴²

- [25] Rabie acquired the minimum knowledge needed to institute action only at the end of 1998, when OSEO finally released the evidence that showed that the Nisec tender had been prepared on a CPA computer. This was 'the smoking gun' that senior counsel, in February 1997, advised him to obtain before he contemplated further litigation based on fraud. With this in hand, the plaintiff promptly issued summons. It was not time-barred when it did."

51.3 *Macleod v Kweyiya*⁴³ - The facts were briefly as follows. The respondent issued summons against the appellant for damages

⁴¹ *Ibid* paras 18, 19 & 20

⁴² *Ibid* para 25

⁴³ 2013 (6) SA 1 (SCA)

relating to injuries sustained when she was approximately 4 years old. The appellant a practising attorney, was instructed by the respondent's mother to institute a damages claim against the statutory insurers of two drivers. When the claim was settled the respondent was approximately 13 years old. When she was almost 25 years old and 11 years after the appellant had accounted to her mother, the respondent caused summons to be issued against the appellant. A special plea of prescription was filed. The Supreme Court of Appeal identified two inter-related issues, firstly whether the respondent could reasonably have known the facts from which her debt against the appellant arose before 19 April 2006 and secondly, whether an adverse inference should be drawn from her failure to give evidence about her state of mind, circumstances or conduct during that period. The issue was therefore whether by the exercise of reasonable care the respondent could have acquired knowledge of the identity of the debtor and the facts from which the debt arose earlier than April 2006. I quote from the judgment:⁴⁴

"[14] Similarly, in this matter the respondent visited the offices of the appellant merely because she had a dispute with her mother pertaining to the occupancy of the house which had been bought with some of the money that had been received as the settlement amount. The visit did not concern the details of the settlement amount. There is no suggestion that at that stage she was concerned about the quantum at all. The version of the appellant confirms that there was no discussion pertaining to the quantum of the claim, the cost of the house and the amount given to her mother. There is no basis to conclude that she should have appreciated that there was something wrong with the quantum of the claim nor with any other aspect of the claim at that stage. More importantly, there is no basis to conclude that she must have realised that there was an under-recovery nor that there was a possible claim for negligence against the appellant. She probably believed, innocently, that the settlement amount was the best under the circumstances. It was not unreasonable of her to trust her mother and the appellant's judgment. In all probability she thought that they had acted in her best interests."

The court reiterated in *Macleod v Kweyiya* that there is an expectation to act reasonably, with the diligence of a reasonable person and that a

⁴⁴ *Ibid* para 14

creditor cannot simply sit back and by supine inaction arbitrarily and at will postpone the commencement of prescription. It eventually found, based on the facts of the case, that the claim had not become prescribed.⁴⁵

51.4 In *Links v Member of Executive Council, Department of Health, Northern Cape*⁴⁶ the facts were briefly as follows. By 5 August 2005 and during hospitalisation the applicant became aware that he had lost his thumb. The issue was whether or not the applicant was aware of the cause of his problem on/or before 5 August 2006. In this case the applicant applied for condonation insofar as the required letter of demand was filed out of time; consequently, the facts were placed before the court by way of affidavit. The court criticised the respondent in the following words in:⁴⁷

[40] Instead of dealing with the applicant's evidence that on or before 5 August 2006 the applicant was not aware of the reason for or cause of his problem, the respondent deals with what happened at the end of August 2006 when the applicant was discharged from hospital. ...

[41] ... Whatever the applicant may have known after 5 August 2006 is irrelevant to the respondent's special plea on prescription. This is because the special plea can only be upheld on the basis of what the applicant knew on or before 5 August 2006. ...

[42] ... However, in cases of this type, involving professional negligence, **the party relying on prescription must at least show that the plaintiff was in possession of sufficient facts to cause them on reasonable grounds to think that the injuries were due to the fault of the medical staff. Until there are reasonable grounds for suspecting fault** so as to cause the plaintiff to seek further advice, **the claimant cannot be said to have knowledge of the facts** from which the debt arises.

[45] ... Until the applicant had knowledge of facts that would have led him to think that **possibly** there had been negligence and that this had caused his disability, he lacked knowledge of the necessary facts contemplated in s 12(3).

[50] ... He (the applicant) did not know or have reasonable grounds to suspect that his negligent treatment at the hands of the respondent's personnel had led to the compartment syndrome. Nor did he know that this in turn caused

⁴⁵ *Ibid* para 9

⁴⁶ 2016 (4) SA 414

⁴⁷ *Ibid* paras 40 – 42, 45 & 50

the amputation of his thumb and the loss of function of his left hand. In my view the High Court and the full court erred in not approaching the matter in this way. ...”

I shall during the evaluation of the evidence specifically deal with the dicta of the Constitution Court quoted in paragraphs 42, 45 and 50 *supra*.

EVALUATION OF THE EVIDENCE

[52] A purchaser intending to claim damages based on latent defects in the *res vendita* has two options. He may claim damages based on breach of contract in terms of the *actio empti* or file a delictual claim based on fraud. The differences in the two actions are evident from Amler’s Precedents of Pleadings by Harms.⁴⁸ The requirements to be proven in both instances are clearly set out and do not have to be repeated. In order to succeed with the *actio empti*, a purchaser relying on fraud must show that the seller knowingly concealed defects or knowingly represented their absence. If a voetstoots clause is contained in the deed of sale the purchaser must prove that the seller was aware of the latent defect when the contract was concluded, that the defect was deliberately concealed, that the seller bore a duty to disclose same and failed to do so. In the case of fraud in contract which led to the conclusion of the contract, the purchaser as the representee may elect to keep the contract alive and claim damages. It is accepted that the respondents rely on delict insofar as they rely on the fraudulent non-disclosure of defects and/or the fraudulent concealment thereof by the appellants which induced them to purchase the property which they would not have done if they were aware of the defects.

[53] The majority judgment takes the view in paragraph 21.4 that the respondents could not have been aware of the identity of the debtor(s). According to my colleagues they would not know against whom to institute action, to wit either the insurer, the appellants, the previous owners or any builder who may have worked on the property. In my view, it could never be in doubt that the appellants as the sellers of the property would be the only people liable in either contract or delict. In any event nothing in the evidence of the two experts

⁴⁸ 9th ed 203 and further and 329 and further

pointed in any other possible direction. The averments in the particulars of claim lend support for the logical conclusion that nobody else could be held responsible.

[54] In paragraphs 20 and 21 of the majority judgment the point is taken that prescription could not start to run before Mr Kempff came on the scene. I do not agree that insofar as the respondents did not know during June 2014 what the cause or causes of the defects were, prescription did not start to run. I shall explain herein that insofar as the house was “falling apart” to use the first respondent’s words due to *inter alia* structural cracks as testified to by him, he had knowledge of the minimum facts to institute action by the time he put in his claim with Absa. Whether or not the clay/soil conditions and/or improper foundations and/or insufficient concrete and/or any other reason could have been advanced for the defects that made the house uninhabitable is a matter of evidence by an expert and this was not required in order to issue summons. My further reasoning will appear in the next paragraphs.

[55] Before evaluating the evidence it is necessary to consider what is meant by a latent defect. Corbett JA stated the following in a unanimous judgment of the Appeal Court in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*:⁴⁹

“Did the bricks contain a latent defect? Broadly speaking in this context a defect may be described as an **abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita*, for the purpose for which it has been sold or for which it is commonly used** (see *Dibley v Furter*, 1951 (4) SA 73 (C) at pp. 80 - 2, and the authorities there cited; also *Knight v Trollip*, 1948 (3) SA 1009 (D) at pp. 1012 - 13; *Curtaincrafts (Pty.) Ltd. v Wilson*, 1969 (4) SA 221 (E) at p. 222; De Wet and Yeats. *Kontraktereg*, 3rd ed., p. 236; Mackeurtan, *Sale of Goods*, 4th ed., p. 246; Wessels, *Contract*, 2nd ed., para. 4677). Such a defect is latent when it is one which is not visible or discoverable upon an inspection of the *res vendita*. I refrain, however, from entering into the question as to whether to be latent the defect must be not “easily visible ” (see *Blaine v Moller & Co.*, (1889) 10 N.L.R. 96 at p. 100) or whether the test is rather that it should not be reasonably discoverable or discernible by the ordinary purchaser (cf. *Schwarzer v John Roderick’s Motors (Pty.) Ltd.*, 1940 OPD 170 at p. 180; *Lakier v Hager*, 1958 (4) SA 180 (T)). Nor is it necessary to consider what effect, if any, is produced by the fact that the purchaser is himself an expert in regard to the *res*

⁴⁹ 1977 (3) SA 670 (A) at 683 H – 684 C

vendita or employs an expert to examine the goods (see in this connection *Knight v Hemming*, 1959 (1) SA 288 (FC))." (emphasis added)

[56] In *Glaston House (Pty) Ltd v Inag (Pty) Ltd*⁵⁰ the Appeal Court took a broader approach and held that the existence of a cornice and pediment including the sculpture which had been declared a national monument and which were embedded in a dilapidated building which precluded the redevelopment for which the property had been bought constituted a latent defect, the reason being that the sculpture, although valuable in itself, hindered the use for which the property was bought.

[57] If one cannot even open or close one's main bedroom door because of jamming and the house is falling apart due to structural cracks, such house can never be regarded as fit for ordinary use as described in the authorities quoted above. It is also appropriate to refer to the following *dictum* by Swain AJA (as he then was) in *Banda and Another v Van der Spuy and Another*:⁵¹

"It is trite that a seller is liable for all latent defects which render the *res vendita* unfit, or partially unfit, for the purpose for which it was intended to be used....

A leaking roof is a latent defect which renders the house unfit for habitation."

[58] While appreciating that the appellants bore the full onus to prove their plea of prescription, including the date on which the respondents obtained actual or constructive knowledge of the debt as required in s 12(3) of the Prescription Act, I shall now deal with specific passages in the evidence of the first respondent in support of my view that the respondents' claim had become prescribed.

58.1 The first respondent, Mr Mokheti, was over the moon with the condition of the house during his inspections of the property prior to the conclusion of the deed of sale. According to him "the kitchen was new, was revamped" and they "literally had to move in and not do a single thing" and "I have not done a single thing in that house since I moved in. No renovations whatsoever. That is how neat the property was. That is why we purchased it."⁵²

⁵⁰ 1977 (2) SA 846 (A); see also *Odendaal v Ferraris* 2009 (4) SA 313 (SCA) paras 25 & 26

⁵¹ 2013 (4) SA 77 (SCA) para 24

⁵² Vol 3 p 318 / 9 - 16

- 58.2 He continued: "I think it was newly painted, Your Honour I think it was newly painted because it was exceptionally neat".⁵³
- 58.3 During the second inspection "the property was pretty much the same" and at that stage the minor repairs undertaken by the appellants had been finalised.⁵⁴
- 58.4 No water problems, no cracks and no structural problems were observed and/or pointed out as is evident from the examination in chief. Although they have viewed a number of properties, this one was different in "that we could move in literally do nothing and just begin to live and enjoy the house."⁵⁵
- 58.5 Although first respondent testified that about a year after moving in, they started experiencing problems, this is not correct insofar as they moved in after registration of the transfer which took place on 22 July 2013, whilst a claim was lodged with Absa on 24 June 2014 at which stage the problems that had gradually surfaced, were seen as major.⁵⁶
- 58.6 The first problem experienced was the main bedroom door that started jamming; thereafter the dining room door did the same. Then fine cracks developed above these doors. "The cracks grew bigger and bigger and bigger."⁵⁷
- 58.7 When Absa was approached the first respondent indicated to them "that the property that they bonded is falling apart and I was submitting my claim."⁵⁸ He may have believed subjectively that there was insurance against these kinds of occurrences such as the house falling apart,⁵⁹ but he might well have decided to take the path of least resistance. We do not know what

⁵³ p 324 / 17 & 18

⁵⁴ pp 331 / 17 – 22 & 332 / 11

⁵⁵ p 334 / 1 - 3

⁵⁶ pp 336 / 2 – 8, 338 / 23 – 25 & 339 / 8 – 13

⁵⁷ p 336 / 10 - 19

⁵⁸ p 336 / 23 - 25

⁵⁹ p 337 / 4 - 8

he claimed at that stage as the claim was lodged telephonically. There can be no doubt that on the first respondent's version he, "a qualified engineer believed that the house was falling apart", these being his own words. Already then it must have been clear that the house was not fit for the purpose they had bought it, bearing in mind the authorities quoted above. Too much cannot be made of the claim with Absa as an objective assessment must be applied and the first respondent's subjective belief is irrelevant. A reasonable person in the position of the first respondent would have realised that the structural defects must have been concealed before conclusion of the deed of sale.

58.8 Only after receipt of the rejection letter of Absa Insurance on 12 August 2014 the first respondent approached a structural engineer, Mr Cas Kempff⁶⁰ who inspected the property and whose report and *viva voce* evidence were correctly accepted.

58.9 The first respondent personally took photographs of the defects. He initially said that the photographs "were taken just before, I think just before I approached Absa and Cas Kempff the engineer."⁶¹ The photographs appear in the record, and although black and white, the inscriptions thereto prepared by the first respondent are quite revealing.⁶²

58.10 Numerous references to structural cracks appear in these inscriptions. The cracks are also pointed out to be either horizontal, or vertical, or even diagonal. Cracks were detected inside and outside the house. The one structural crack in the main bedroom went "through the 220 wall from the inside to the outside of the house."⁶³

58.11 The reason for taking the photos was mentioned to be the following:

"Basically just to make a case, Your Honour in terms of the **structure falling apart**."⁶⁴
(emphasis added)

⁶⁰ p 344 & 345

⁶¹ p 348 / 4 - 5

⁶² Vol 1 p 54 – 61

⁶³ pp 354 / 20 to 355 / 9 & 356 / 5 - 8

⁶⁴ p 353/ 1 - 2

- 58.12 With reference to a diagram of the house forming part of the photo bundle, the first respondent indicated that the cracks were “literally everywhere” and “developing every day.”⁶⁵
- 58.13 The first respondent dealt in his evidence with several other structural cracks and other defects, but it is not necessary to deal with all these, bearing in mind the first respondent testified that he became aware of clay conditions and the underpinning of the foundation of the house on the eastern and western sides after he had received the letter of rejection from Absa Insurance and during the time that Mr Kempff the engineer came on the scene.⁶⁶
- 58.14 The first respondent’s knowledge of underpinning became clear during his evidence in chief.⁶⁷ On his version he only became aware of “patchwork” when Absa mentioned it and upon the inspection and report of Mr Kempff.⁶⁸
- 58.15 The first respondent is a Regional General Manager of the Independent Development Trust who has a Bachelor of Science Degree in Civil Engineering and a National Diploma in Civil Engineering as well as a Master’s Degree in Business Administration. He is acquainted with foundations as well as different types of soil.⁶⁹
- 58.16 In cross-examination the first respondent testified about the gradual development of cracks⁷⁰ and the dates when the photos were taken.⁷¹
- 58.17 It is accepted that there was uncertainty as to the time period within which photos were taken, but the first respondent eventually said the following:

⁶⁵ p 353 / 5 – 10

⁶⁶ See *inter alia* pp 381 / 12 – 20 & 383 - 384

⁶⁷ p 383 / 3 - 17

⁶⁸ p 392

⁶⁹ p 419 / 5 – 421

⁷⁰ pp 454 / 1 – 16 & 458 / 17 – 19

⁷¹ pp 461 / 4 – 8 & 18 – 23; & 462 / 1 - 25

"Mr Sander: Okay, now you are telling this Court that you cannot really recall in respect of Absa if the photos were taken before or after that?

Mr Mokheti: **I am sure that it is before that, Your Honour.**"

This was repeated later on in the following words:

"Your Honour, they were all taken before the structural engineer and I think before the Absa, but I am saying if the Court really needs a date Your Honour, that can be determined when did I take the photos."⁷² (emphasis added)

58.18 In respect of diagonal structural cracks in the main bedroom the first respondent testified as follows:

"Diagonal means it is about 45 degree, more or less. It is not vertical. It is not horizontal. So it is at an angle. And **I called it structural because it was visible from the outside and from the inside**, as well as from the inside."⁷³ (emphasis added)

58.19 Pertaining to the first respondent's experience or knowledge of structural cracks he said the following:

"Mr Sander: Now you also make reference to a diagonal structural crack as you now said, that term diagonal structural crack is that also something you drew from your experience and your academic qualifications what a structural crack would constitute?

Mr Mokheti: What, not the word diagonal, Your Honour, but the word structural, yes."⁷⁴

58.20 No doubt the respondent was fully aware of the differences between a plaster and a structural crack when he said the following:⁷⁵

"Mr Mokheti: But it goes through the wall it goes through the structure. And I think that is where the word comes from. That is why they will say it is a structural crack, because the **structure is cracking** and not the plaster is cracking."

58.21 The first respondent knew before he lodged his claim with Absa that he encountered structural cracks.⁷⁶

58.22 The final nail in the coffin is the following admission:

⁷² p 465 / 16 – 19. See also p 466 / 1 - 7

⁷³ p 469 / 10 - 14

⁷⁴ p 471 / 8 – 16. See also p 473 / 1 – 12 & pp 477 / 20 – 478 / 11

⁷⁵ p 478 / 8 -11

⁷⁶ p 479 / 1 – 17, p 480 / 14 – 15 & p 481 / 1 - 21

“Mr Sander: I will proceed with the questions just now. Based on your evidence today and that is what it is getting at is you were aware that there were certain structural cracks or defects in that sense **prior to submitting your claim to Absa?**

Mr Mokhethi: Yes, Your Honour.”

The first respondent went further:

“Mr Mokhethi: ...that is why I am making a claim and these were no hairline cracks. ... So these were serious cracks that is why I reported the matter, Your Honour. ...

Mr Sander: At which stage (24 June 2014) you were well aware of the structural cracks and defects?

Mr Mokhethi: Yes, I was aware of the cracks in my house, Your Honour.”⁷⁷

and:

“Mr Mokhethi: Yes, the cracks start appearing and then I would see that it is growing bigger and therefore they are becoming structural so they are growing bigger and therefore I reported it.”⁷⁸

Later on the first respondent testified as follows:

“Mr Mokhethi: Your Honour, when I took these pictures and when I submitted it then that is what my notes says that the cracks were big enough to go through. **Then those were deemed structural cracks. And that is when I submitted to Absa.**”⁷⁹ (emphasis added)

Later on we find the following question and answer:

“Mr Sander: So maybe a month or two before June you realised there was structural cracks and then you proceeded to lodge your claim somewhat later?

Mr Mokhethi: That is correct, Your Honour.”⁸⁰

The first respondent confirmed that he was not aware of the cause of the cracks.⁸¹ He also confirmed during re-examination that he was not able with his expertise to establish the cause of the cracks when he observed them and took photographs.⁸²

⁷⁷ pp 488 / 11 -15 & 489 / 3 - 17

⁷⁸ p 490 / 11 - 14

⁷⁹ p 495 / 24 – p 596 / 3

⁸⁰ p 497 / 5 - 8

⁸¹ p 517 / 17 - 20

⁸² p 524 / 10 - 16

58.23 Although he at a stage mentioned the cracking of houses in the Klerksdorp area, he made it clear in his re-examination that he did not want to create the impression that there was anything like that in the Bloemfontein area.⁸³

[59] I do not agree with the majority that in order to prevent prescription from running, the respondents had to be aware of the cause of the structural cracks. In my view the first respondent was in possession of sufficient facts to cause him on reasonable grounds to think that there were latent defects in the house which were covered up by the sellers, the appellants, bearing in mind that the house was neat and newly painted whilst cracks started to open up soon after occupation. In the words of the Constitutional Court in *Links*, at best for the first respondent he had knowledge of facts that would have led him to think that possibly the defects existed and were latent and that these were fraudulently concealed by the appellants. In this regard it is apposite to again refer to the *dictum* of the Supreme Court of Appeal in *Macleod v Kweyiya* referred to above and quoted fully in paragraph 16.3 of the majority judgment. At best for the first respondent it was expected of him to act reasonably and with the diligence of a reasonable person. He could not wait for expert evidence in order to prove his case comfortably as mentioned in *Macleod v Kweyiya*. I repeat, what was required was merely knowledge of the minimum facts necessary to institute action.

[60] ‘Cause of action’ for the purposes of prescription means “... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”⁸⁴ Again as mentioned in the authorities quoted, s 12(3) of the Prescription Act requires knowledge only of the material facts from which the debt arises for the prescriptive period to begin running; it does not require knowledge of the relevant legal conclusion (*ie* that the known facts constitute negligence) or in this case, fraud in the form of fraudulent concealment of latent defects or of the existence of an expert opinion which supports such conclusions. It is also important to remember that a latent

⁸³ Vol 4 p 536 / 6 - 25

⁸⁴ *Truter and Another v Deysel supra*

defect is “an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita* for the purpose for which it has been sold off or which it is commonly used.”⁸⁵ The structural cracks and doors in the house that started to jam are defects that substantially impaired the effectiveness or common use of the house.

[61] There could never have been any doubt about the identity of the debtors. The respondents bought the house from the appellants which was in a neat, if not perfect, condition and newly painted at the time. Soon after occupation doors started jamming and structural cracks appeared. The only people possibly responsible in contract or delict could be the appellants.⁸⁶ In June 2014 the respondents and the first respondent in particular had knowledge of the minimum facts from which the debt arose. Even if it could be said that he had to establish the cause of the structural cracks and jamming of the doors, he could have acquired such knowledge by exercising reasonable care and obtaining the advice of an expert at the time instead of waiting for a response from Absa which arrived on 12 August 2014 only.

[62] I am of the view that the reasonable purchaser would have realised that, insofar as the house was neat and recently painted, the serious cracks that started to appear within months must have been patched in the process of painting and that these defects had been fraudulently concealed from prospective purchasers. The law of prescription would be so totally ineffective that it may as well be abolished to use the words of the Constitutional Court in *Mtokonya supra* if prescription is not held to have started running before or on 24 June 2014 at the latest.

[63] In the final analysis, and at best for the respondents, they could at least by 24 June 2014 in the exercise of reasonable care acquire knowledge of the facts from which the debt had arisen and also that the debtors were none other than the appellants. In *Links supra*⁸⁷ the Constitutional Court stated that it had to be shown that the plaintiff was in possession of sufficient facts to cause him on reasonable grounds to think that the injuries were due to the fault of the medical

⁸⁵ *Holmdene Brickworks supra*

⁸⁶ *Banda and Another v Van der Spuy and Another supra*; *Amler's Precedents of Pleadings supra*

⁸⁷ *Links supra*, paras 42, 45 & 50 in particular

staff. It went on to say that until there were reasonable grounds for suspecting fault the plaintiff could not be said to have knowledge of the facts from which the debt had arisen. If the *dictum* of the Constitutional Court is applied *in casu* the first respondent had reasonable grounds to suspect fraudulent concealment or that possibly there had been such fraudulent concealment and that the appellants acted intentionally and unlawfully in concealing the defects.

[64] I therefore conclude that the respondents' claim had become prescribed and that I would have upheld the plea of prescription with costs.

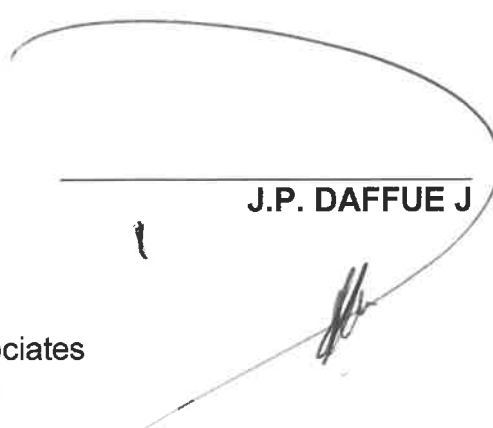
[65] In the light of my conclusion and bearing in mind that this a minority judgment, I find no reason to deal with the merits of the claim based on fraudulent misrepresentation.

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J.P. DAFFUE J