

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: HCA10/2020

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
Signature <i>[Handwritten Signature]</i>	
Date <i>02/11/2021</i>	

In the matter between:

JAN PIETER LE ROUX**APPLICANT**

and

CHRISTIAAN FREDERIK ZIETSMAN**FIRST RESPONDENT****ESTER PETRONELLA ZIETSMAN****SECOND RESPONDENT**

JUDGMENT

MAKGOBA JP

[1] This is an appeal against the judgments and orders of Regional Court Magistrate Laminga in respect of the merits delivered on 31 August 2018 and Magistrate Vorster in respect of quantum delivered on 23 October 2019, both in the Regional Court sitting at Tzaneen.

The Appellant was the Defendant and the Respondents were the Plaintiffs in the *Court a quo*.

For the sake of convenience the parties in this appeal will be referred to as in the *Court a quo*; i.e. the Plaintiffs and Defendant.

[2] The Plaintiffs claimed from the Defendant damages resulting from patrimonial loss in repairing a roof of a house and loss of income as the house could not be used as a guesthouse during repairs of the roof. The Plaintiffs relied on fraudulent misrepresentation as a cause of action, alternatively fraudulent non-disclosure. Both of the Plaintiffs' claims are based on a written Deed of Sale in terms of which the Plaintiffs purchased an immovable property ("the property") from the Defendant.

[3] The Plaintiffs' claims are based upon the following material allegations:

3.1. The roof of the property suffered from a defect;

3.2. The Defendant was aware of the defect in the roof;

3.3. The Defendant had a duty to disclose the defect to the Plaintiffs;

[6] The *Court a quo* awarded damages in favour of the Plaintiffs for:

- 6.1. Payment of R167 480-23 in respect of the costs of repairs to the roof and;
- 6.2. Payment of R68 038-00 in respect of loss of income.

The appeal to this Court is on both merits and quantum of damages.

[7] The issue before the *Court a quo* was not the leaking of the roof of the house which the Plaintiffs purchased from the Defendant, but whether the Defendant knew of the structural defects in the roof which caused it to leak.

The *Court a quo* found that what was in dispute was knowledge of the Defendant of the structural defects of the roof, the extensive leakage and whether the Defendant failed to disclose it.

In the light of the above, two essential questions remain to be answered in this appeal:

- 7.1. Whether the Plaintiffs proved that the Defendant was aware of the latent defects i.e. the structural defects in the roof; and
- 7.2. Whether the facts in this case resulted in the faulty condition of the roof being obvious or easily discoverable upon reasonable inspection.

[8] The Defendant disputes that he perpetrated a fraudulent non-disclosure or misrepresentation. He alleges that the roof leak was disclosed to the Plaintiffs and that the Plaintiffs are precluded from claiming damages by virtue of the fact that the Deed of Sale contained a voetstoots clause.

Furthermore the Defendant disputes that it was impossible to sustain the business of a guesthouse without repairing the defective roof.

Accordingly, the Defendant disputes that the repairs to the roof were necessary and that the Plaintiffs were unable to conduct the business of a guesthouse as a result of the defects and the repairs for a period of two months as alleged.

[9] Based on the pleadings in this matter the material issues in dispute and which the Plaintiffs were required to prove in the *Court a quo* were:

- 9.1. Whether the Defendant perpetrated a fraudulent non-disclosure or misrepresentation;
- 9.2. Whether the Plaintiffs were entitled to claim damages in circumstances where the Deed of Sale contained a voetstoots clause;
- 9.3. Whether the repairs to the roof were necessary;
- 9.4. The quantum of the repairs to the roof;
- 9.5. Whether the Plaintiffs were unable to conduct the business of a guesthouse as a result of the defect and the repairs for a period of two months;

[11] The following facts are common cause between the parties:

- 11.1. The Plaintiffs signed a deed of sale of the property on 28 March 2011;
- 11.2. The Plaintiffs took occupation of the property on 11 July 2011;
- 11.3. During a visit to the property in February 2011 the Second Plaintiff, Ms. Thornhill and the Defendant were at the property during which time they had a conversation about the leak in the roof above room 7. It is a fact that room 7 indeed had a leak of which the Defendant was aware;
- 11.4. The Defendant was aware that the Plaintiffs intended to use the property for the purpose of conducting the business of a guesthouse;
- 11.5. Had the Plaintiffs been aware of the extent of the leaks and the condition of the defects in the roof, they would not have purchased the property.

[12] The evidence of the Plaintiff is summarized as follows:

- 12.1. The Plaintiffs were introduced by Ms. Thornhill, an estate agent who knew that the Defendant was intending to sell a property from which the Defendant was operating a guesthouse known as Lavenir. The Defendant indicated another property from where he was operating another guesthouse known as Christie's Inn Guest House. This is the property the Plaintiffs eventually purchased from the Defendant and which is the subject of this litigation.

12.5. The Plaintiffs claimed under the Homeowners Insurance Policy with Santam, but the claim was rejected due to the findings of the assessor. Initially the Plaintiffs did not have the funds to repair the roof and coped as best as they could. Every time it rained the roof leaked again. Eventually they obtained a loan and commenced repair work in March 2014. Prior to the appointment of contractors no construction work was done to the roof between 2011 and 2014. It was impossible to continue conducting a guesthouse business with the roof in its defective state. According to the Second Plaintiff had they been aware of the condition of the roof, they would never have bought the property.

12.6. On 12 April 2013 the plaintiffs appointed a civil engineer, Mr. Rosslee, who inspected the roof and provided a report on 11 May 2013. According to his expertise as a civil engineer the roof of the property was poorly constructed and maintained resulting in it being prone to leak from the day it was built.

12.7. The First Plaintiff (Mr. Zietsman) is the registered owner of the property in question. During the first visit, he went to the property with the Second Plaintiff and Ms. Thornhill.

He confirmed the evidence of the Second Plaintiff that during the first rains there were serious leakage, so much so that all the rooms leaked. Linen got wet, guests complained, furniture and mats were affected.

[15] In cross-examination Mr. Rosslee said he found it impossible to believe that the Defendant had not encountered problems during the five years plus, that he owned the property.

No expert witness was called and evidence led for or on behalf of the Defendant to contradict the testimony of Mr. Rosslee. The expert evidence of Mr. Rosslee remains uncontested.

[16] The Defendant testified that he occupied the property for 5 (five) years and 9 (nine) months before the Plaintiffs took occupation on 11 July 2011. During that time only room 7 leaked when it rained. He employed a contractor to cover a portion of the roof slightly bigger than a double garage with plastic. The only leakage problem that he disclosed to the Plaintiffs was in room 7.

For the full 5 (five) years and 9 (nine) months that he occupied the property, only that one room, namely room 7 leaked and this was the state of affairs on 11 July 2011 when Plaintiffs took occupation.

The Defendant testified that he did point out the mark on the ceiling to the Second Plaintiff and Ms. Thornhill when they viewed the property. During the same inspection he also informed them that he had a problem with a leak in room 7, which he had tried to repair by installing a plastic membrane under the roof tiles.

[17] The Defendant denied that he had experienced that the roof leaked, except in room 7. When it was put to him that with the first rains in September/October 2011 all the rooms leaked, he responded that it is unbelievable. He denied that if it were so, there had been a dramatic deterioration of the roof in a period of three months from 11 July 2011.

The Defendant was unable to explain how the condition of the roof as alleged by him as at 11 July 2011 could have deteriorated so dramatically in a period of 3 (three) months that the whole roof leaked during September/October 2011.

Evaluation of the Evidence

[18] Taking into consideration the conspectus of the evidence on record and the credibility of all the witnesses in this matter, it is accepted as a fact that with the first rains of September/October 2011, all the rooms of the property leaked. This is confirmed by the Plaintiffs and Ms. Thornhill. Once it is accepted that all the rooms leaked, it becomes inconceivable that the condition of the roof as alleged by the Defendant could have deteriorated so dramatically in a period of three months.

[19] The testimony of the Plaintiffs and Ms. Thornhill on this point is strongly corroborated by the objective evidence of the engineer, Mr. Rosslee. The Defendant's version is irreconcilable with Mr. Rosslee's evidence that there

were numerous places where rainwater had direct access to the ceiling below, as a result of longstanding defects in the roof construction.

Of particular importance in Mr. Rosslee's report is paragraph 6 wherein it is stated:

"Any claim by the previous owner that no problems with the roof leaks were experienced in the past, would simply be impossible and untruthful".

[20] I accordingly make a finding that the whole roof of the property had latent defects.

Issue for determination

[21] The issue for determination in the present appeal before us is whether the Plaintiffs proved the requisite knowledge on the part of the Defendant of the latent defects in the roof, which he then fraudulently concealed from the Plaintiffs.

[22] An assessment of whether the Plaintiffs proved that the Defendant knew of the latent defects in the roof, which caused it to leak, and also that he knew that the repairs effected would not permanently solve the problem of it leaking, in the face of the Defendant's denial that he possessed such knowledge, requires an

assessment of the objective facts. Any inference sought to be drawn must be drawn from the facts revealed by the evidence.

[23] Before this Court the Defendant (Appellant) contends that the Plaintiffs (Respondents) have not established a case of fraud against him and that the Court below therefore erred in finding that the Plaintiffs could avail themselves of the aedilitian remedies despite the voetstoots clause. Counsel for the Plaintiffs, on the other hand, contends that the evidence established willful non-disclosure against the Defendant.

[24] It is not clear from its judgment whether the *Court a quo* found that the Defendant willfully concealed the defects. Nor does the Court's reasoning deal with the effect of the voetstoots clause, which excludes liability for both latent and patent defects. It nevertheless upheld the Plaintiffs' submission that it was entitled to invoke the aedilitian remedies and rejected the Defendant's contention that he did not have knowledge of the latent defects on the roof.

The Law on latent defects

[25] Defects, whether latent or patent, are abnormal qualities or attributes which destroy or substantially impair the utility or effectiveness of the property for the purpose for which it had been sold and is commonly used.

Defects are latent in that they would not have been visible or discoverable upon inspection by the ordinary purchaser.¹

A seller in a contract of sale has a duty to disclose latent defects in the merx of which the seller is aware.²

In ***Van der Merwe v Meades***, supra, it was held that a seller will be deprived of the protection afforded by a voetstoots 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* concealed its existence from the purchaser with the purpose of defrauding him.

[26] The above legal principle is the real issue involved in the present case.

[27] It is also trite that where a seller recklessly tells a half-truth or knows the facts but does not reveal them because he or she has not bothered to consider their significance, this may also amount to fraud – See ***Odendaal v Ferraris***³.

The voetstoots clause in a contract of sale in this instance will not relieve the seller from liability for misrepresentation.⁴

¹ *Holmdene Brickworks (Pty) Limited v Roberts Constructions Co Limited* 1977 (3) SA 670 (AD) at 683H-684C.

² See *Van der Merwe v Meads* [1991] 4 ALL SA 42, 1991 (2) SA 1 (a). See also *Truman v Leonard* [1994] 4 ALL SA 445, 1994 (4) SA 371 (SE); *Banda v Van der Spuy* 2013 (4) SA 77 (SCA) at [24].

³ 2009 (4) SA 313 (SCA) at para [29].

⁴ See *Cockcroft v Baxter* 1955 (4) SA 93 (C).

The authorities are clear that fraud will not lightly be inferred, and where a party seeks to do so the allegation must be clear and the facts upon which the inference is sought to be drawn must be succinctly stated.⁵

- [28] The operation of the voestoots clause in a contract of sale is thus confined to cover those latent defects which the seller did not deliberately conceal in order to induce the contract – **Truman v Leonard 1994 (4) SA 371 (SE)**.

In **Banda v Van der Spuy**⁶ it was said:

“[24] 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 of 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. The respondents were unaware, however, of the other cause of the leaking roof, namely the inadequate pitch of the roof. The fact that they were unaware of an additional cause of the leaking matters not. Their fraudulent conduct in concealing the existence of the defective, leaking roof forfeits the protection of the voetstoots clause in respect of this latent defect”.

⁵ *Breedt v Elsie Motors (Edms) Bpk* 1963 (3) SA 525 (A).

⁶ 2013 (4) SA 77 (SCA) at para [24].

[29] It follows that in this case, to succeed in their claim the Plaintiffs have to prove that the Defendant:

- (a) was aware of the defects in the property at the time of the negotiations and the conclusion of the agreement of sale;
- (b) had a duty to disclose the defects to the Plaintiffs' and
- (c) misrepresented the status of the defects and/or concealed the existence and/or extent of the defects in order to defraud the Plaintiffs.

Whether the Defendant perpetrated a fraudulent non-disclosure or misrepresentation

[30] The *Court a quo* made a finding that the Plaintiffs failed to prove on a balance of probabilities that the Defendant made a misrepresentation that the leak pointed out (in room 7) was fixed.

However, this cannot be the end of the matter because the Plaintiffs also rely on fraudulent non-disclosure in that the Defendant failed to disclose the defects in the condition of the roof and the extent of the leakage of the roof in order to ensure the sale transaction.

The defects in the roof which cause it to leak and the extent of the leaks are latent defects in that they would not have been visible or discoverable upon inspection by the ordinary purchaser.

[31] To determine whether the Plaintiffs proved that the Defendant knew of the latent defects in the roof which caused it to leak, that the roof leaked in other areas besides room 7 and whether he also knew that the repairs he made would not permanently solve the problem of it leaking, the objective facts must be assessed. In his evidence the Defendant denies that he possessed any knowledge regarding the defects which caused the roof to leak, that he lacked knowledge of any other leaks in the roof and stated that he believed the repairs he effected in room 7 would be effective. The Defendant's evidence in this regard should be looked against the background of the following objective facts:

- 31.1. When the first rains fell after the Plaintiffs took occupation of the property, the roof leaked badly;
- 31.2. The uncontested evidence of Mr. Rosslee, the civil engineer is that the entire roof speaks of negligent design, inferior workmanship and bad maintenance;
- 31.3. According to Mr. Rosslee it is impossible to believe that the Defendant had not encountered problems with leakage of the roof during the five years plus, that he owned the property;
- 31.4. There is overwhelming evidence that the design and construction of the roof was seriously flawed and that it was prone to leak from day one.

[32] In his own version the Defendant had conducted maintenance to the roof in painting it and at least once, called a contractor to deal with the leak in the roof. That contractor would have had to diagnose the problem in the roof in order to advise the Defendant on a solution.

In my view it is unlikely that the contractor would not have noticed and would not have alerted the Defendant to at least some of the structural defects.

It is therefore highly improbable that the Defendant was not aware of the extent of the defects and the widespread problem with leaks in the roof.

The *Court a quo*'s finding that the Defendant knew of the defects in the roof and the extent of the leaks was much wider than just in one room cannot be faulted.

[33] The *Court a quo* was correct in drawing an inference that the Defendant had knowledge of the latent defects in the roof. Any inference must be drawn from the facts revealed by the evidence.

In this case the following facts were proved to justify the drawing of an inference:

33.1. The Defendant was in occupation of the property for five years and nine months;

33.2. In July 2011 the Defendant told the Plaintiffs that the roof had leaked in room 7, but had been repaired and no longer leaked;

33.3. With the first rains in September/October 2011, all the rooms leaked;

33.4. The engineer's inspection revealed that the entire roof construction was defective and prone to leak from the day it was built.

[34] In criminal trials inferences must be:

- (a) consistent with all the proved facts;
- (b) the proved facts should be such that they exclude every reasonable inference save the one to be drawn.⁷

In civil cases rule (b) is not applicable and if the facts permit more than one inference, the Court must select the most plausible. If it favours the Plaintiff, he is entitled to judgment. If inferences in favour of both parties are equally possible, the plaintiff has not discharged the burden of proof.⁸

[35] *In casu*, the inference that the Defendant was aware of the defects is consistent with all the proved facts.

The inference drawn is the most plausible because in the light of the engineer's report and the extensive and long-standing defects in the roof, it is very difficult to believe that the Defendant could not have been aware of the seriousness of the leakage problems. Furthermore, the roof could not possibly have deteriorated from the condition which the Defendant alleged in evidence,

⁷ *R v Blom* 1939 AD at 202-203.

⁸ See Hoffman and Zeffertt : The South African Law of Evidence 4th Edition on page 590.

namely that only room 7 leaked to its actual condition three months later, when all the rooms leaked.

It is noteworthy that the Defendant admitted to a spot on the ceiling of room 7, but used plastic sheeting/membrane larger than a double garage to address it. This surely indicates knowledge of a leak far more extensive than what he admitted.

- [36] The question that remains is whether the Defendant had a duty to disclose the defects and whether he failed to disclose this with the required intent. This question is answered in the affirmative and for the following reasons:

The property was to be used as a guesthouse and the importance of having a well maintained structure to conduct such a business is a given fact and admitted by the Defendant. The fact that there were extensive leakage problems with the roof is material and the Defendant had a duty to disclose this to the Plaintiffs.

Taking into consideration the circumstances in which the Defendant failed to disclose the true extent of the leakage of the roof and the defects in the roof, I come to the conclusion that the information had been withheld to secure the sale and to benefit the Defendant.

[37] A seller is deprived of the protection of a voetstoots clause in circumstances where the seller perpetrated a fraudulent non-disclosure.⁹

As the Plaintiffs have successfully proved the fraudulent non-disclosure, the voetstoots clause is not a bar to their claim in this case.

In the result I make a finding that the Plaintiffs proved on a balance of probabilities that the Defendant intentionally failed to disclose the defects in the roof and the true extent of the leakage of the roof of the property in order to ensure the sale of the property and that the Plaintiffs would not have entered into the sale agreement as they did, had they been aware of the defects.

The Plaintiffs are accordingly entitled to the reasonable costs of repairing the roof and other concomitant loss they may have suffered.

Quantum of Damages

[38] The *Court a quo* awarded damages in favour of the Plaintiffs in an amount of R167 480-23 for the repairs of the roof of the property and an amount of R68 038-00 in respect of loss of income.

In this appeal the Defendant contests the award of the aforesaid amounts.

It was argued on behalf of the Defendant that the findings of the *Court a quo* on the quantum of damages raises serious questions as to probity. In particular it was pointed out that the quantification of the damages amounts was based on

⁹ *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 (A) – that where fraud is alleged one does not simply think away the voetstoots clause.

inadmissible evidence in the form of copies of documents which lacked originality and authenticity.

[39] The Second Plaintiff testified in respect of the quantum of the roof repairs that she bought materials herself and provided all the invoices in respect of the labour and materials to the quantity surveyor, Mr. Gerrit Nauta. The latter quantified the costs of roof construction and also testified in the *Court a quo* as to the reasonable costs of repairs.

Both the Second Plaintiff and Mr. Nauta testified that two months was a reasonable period in which to complete the repairs.

[40] At the trial the Defendant consented to the use of copies of documents¹⁰ and admitted the authenticity of the trial documents¹¹. There is no merit in the Defendant's argument before us that the documents used and handed up at the trial lacked originality and authenticity.

[41] The Second Plaintiff testified that the repair lasted for more than two months and that the guesthouse could not be operated for that period.

On the loss of income she testified that she utilized external accountants to compile the guesthouse's financial statements. She personally input all of the income and expenses of the guesthouse into a computer and the accountant

¹⁰ Record, Volume 3, page 2 at 19.

¹¹ Record, Volume 3, page 2 at 8 to 11.

had remote access thereto. The accountant, Isabel Nel compiled the financial statements for the year 1 March 2014 to 28 February 2015, which statements the Second Plaintiff examined and verified as correct. All the financial statements were provided to the chartered accountant, Mr. Albert Nothnagel. The latter testified at the trial and confirmed that he utilized the income statement of 1 March 2014 to 28 February 2015 as the basis of his calculation. He calculated the income on the basis of the average income per month for the period multiplied by two. This, according to Mr. Nothnagel was the logical and best way to quantify the loss of income.

[42] The purpose for awarding damages for patrimonial loss is to place the plaintiff in the financial position, to the extent that money can do so, the plaintiff would have been in had the delict or breach of contract not been committed, thereby redressing the diminution (or probable diminution) in his or her patrimony caused by the defendant – See **LAWSA Volume 7 at paragraph 25**.

The Plaintiffs' version as to the quantum of damages in respect of the roof repairs and the two months loss of income in respect of the guesthouse business was, in my view, correctly accepted by the *Court a quo*.

[43] The approach to the determination of quantum of damages was succinctly put by Diemont JA in the case of **Esso Standard SA (Pty) Ltd v Katz**.¹²

The learned Judge quoted with approval what was said in the case of *Herman v Shapiro and Company* 1926 TPD 367 at 379, the following:

“Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the Plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it”.

¹² 1981 (1) SA 964 (AD) at 970 E-G.

[44] It has long been established that in some type of cases damages are difficult to estimate and the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach of duty.

The Appellate Division (as it then was) in ***Esso Standard SA***, *supra*, enunciated that whether or not a plaintiff should be non-suited depends on whether he has adduced all the evidence reasonably available to him at the trial.

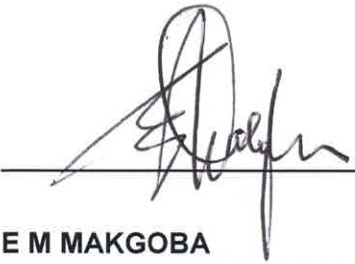
[45] *In casu*, I am of the view that the trial Court correctly found that it was clearly proved that the Plaintiffs did suffer pecuniary damages and that they proved the damages by the best evidence available to them. The Plaintiffs led the best possible evidence which they were able to do to enable the trial Court to assess the loss, and did not leave the trial Court to guess the extent of the loss.

[46] The *Court a quo* came to the correct finding when judgment on both merits and quantum was granted in the Plaintiffs' favour.

Consequently, the appeal must fail.

Order

[47] The appeal is dismissed with costs.



E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH
COURT, LIMPOPO DIVISION,
POLOKWANE

I agree



M B MADAVHA
ACTING JUDGE OF THE HIGH
COURT, LIMPOPO DIVISION,
POLOKWANE

APPEARANCES

Heard on	: 22 October 2021
Judgment delivered on	: 02 November 2021
For the Appellant	: Adv. S B Nel
Instructed by	: Ruan Vorster Attorneys c/o De Bruyn Oberholzer Attorneys
For the Respondents	: Adv. N Louw
Instructed by	: Stewart Maritz Basson c/o Pratt Luyt & De Lange