

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape High Court, Kimberley)

Case No: 1026/2009
Heard: 13/ 12 / 2011
Delivered: 19 /12 / 2011

In the matter between:

DAVID FRANCOIS DE WIT

Plaintiff

v

ANDREW THOMAS HOFFMAN

Defendant

JUDGMENT

KGOMO JP

- 1] This case has been set down for trial for three days. However, the defendant did not instruct counsel to appear on his behalf nor is he present. He has intimated in a letter dated 28 November 2011 through his attorneys that he is not in a financial position to fund a trial and also not in a healthy condition to attend the trial. He has nevertheless not asked for a postponement. He may have been dissuaded from doing so by the fact that he had previously done so on the eve of the trial that was scheduled for 01-03 November 2010. Defendant was notified by plaintiff's attorneys that they would proceed to obtain the relief sought, as they are entitled to insist.
- 2] On 25 October 2007 the parties hereto entered into a written contract in terms of which the defendant sold to the plaintiff an

immovable property, Erf 3106, Springbok, Northern Cape, with dwellings thereon for R1 745 000-00 and furniture and equipment for R55 000-00. The dwellings comprised an unoccupied main house and ten occupied flats. Plaintiff acquired the place with his pension money as a bed and breakfast (B&B) establishment.

- 3] Strangely, a month before the registration and transfer of the property in plaintiff's name, which took place on 13 May 2008, the full purchase price was paid over to the defendant contrary to the instructions of the plaintiff. Apart from R1 800 000-00 that was paid to the defendant the plaintiff also incurred R13 040-00 in respect of transfer legal costs and R84 600-00 towards transfer duty.
- 4] In his main claim the plaintiff now sues for the cancellation or confirmation of the cancellation of the contract of sale and ancillary relief. The basis for the cancellation is essentially, and in summary, that: The improvements on the property effected by the defendant were done wrongfully and unlawfully and/or were not sanctioned or approved by Springbok Municipality (now called the Nama Khoi Municipality) and/or were not erected in accordance with any approved building plans and specifications and/or the dwellings do not comply with the National Building Regulations and Building Standards Act, No 103 of 1977.
- 5] The plaintiff, a Pretoria/Tshwane inhabitant, who wanted to retire to the tranquil far-West setting of the Northern Cape, thought that he had found the ideal place which could also augment his insubstantial pension which Ms Valerie Myburgh, a Seeff Property agent, showed him. The agent did not alert him

to any defects that the property might have. At face-value, as a layman involving property, the place looked impressive to the plaintiff. Shortly after having viewed the property the plaintiff had a telephonic discussion with the defendant/seller and enquired from him whether there was any problem with the property, in particular the improvements, that he needed to know. Defendant responded that there were none.

6] In due course the plaintiff discovered the following defects or latent defects from his own observation and as he was alerted to or advised by four experts in the construction industry and whose evidence is dealt with later. They confirmed:

- "9.1 *Die elektriese installasies op die eiendom voldoen nie aan die Wet op Beroepsgesondheid en Veiligheid, No.85 van 1993 en SANS 10142-1kode nie, ten spyte van 'n voldoeningssertifikaat vir elektriese installasies wat op 10 April 2008 deur die Verweerder self uitgereik is, en is die verbeterings op die eiendom as gevolg daarvan nie geskik vir veilige bewoning nie;*
- 9.2 *Die badkamer in woonstel no. 1 het geen venster of uitsuigwaaier of enige ander voorsiening vir ventilasie nie;*
- 9.3 *Die slaapkamer in woonstel no. 1 se enigste venster is na die motorhuis en nie na buite;*
- 9.4 *Die buitevenster wat op die bouplan van die woonstel no. 1 verskyn, is nie aangebring nie;*
- 9.5 *Daar is 'n kragprop direk onder 'n kraan in woonstel no 1;*
- 9.6 *Die slaapkamervenster in woonstel no. 2 is nie op die bouplan aangedui nie en word nie so na aan die erfgrens toegelaat nie;*
- 9.7 *Die konstruksie van woonstel no. 3 is swak en toon tekens van onstabiliteit;*

- 9.8 *Die dakbalke van woonstel no. 3 nie aan voorgeskrewe spesifikasies vir die span van die balke voldoen nie;*
- 9.9 *Die noord – westelike muur van woonstel 3, wat ook as skeidsmuur van die aanliggende erf dien, oor geen versterkings beskik nie;*
- 9.10 *Die konstruksie van woonstel no. 4 is swak en toon tekens van onstabiliteit;*
- 9.11 *Woonstelle no. 6 en 7 nie oor behoorlike fondasies beskik nie;*
- 9.12 *Die standak van golfsink by woonstel no. 8 het `n baie lae helling en voldoen nie aan die voorgeskrewe spesifikasies nie;*
- 9.13 *Daar ernstige rioleringsprobleme op die eiendom ondervind word, waaronder riool wat deur die toilet in woonstel no. 9 opstoot, afvoerpype wat nie behoorlik geïnstaleer of gekoppel is nie, rioleringspype wat nie druktoetse sal slaag nie en `n algemene gebrek aan mangate, steekoë en inspeksiepunte;*
- 9.14 *Woonstel no. 9 toon erge vogprobleme weens `n gebrek aan enige of voldoende vogbeskerming of – behandeling;*
- 9.15 *Die toilet in een van die slaapkamers in die hoofwoning beskik oor geen ventilasie nie;*
- 9.16 *Die afvoerpyp van woonstel no. 4 en 6 se kombuiswasbakke en woonstelle no.6, 7 en 8 se storte loop bogronds in die tuin uit.*
- 9.17 *Die erfgrens van die noordekant van die eiendom oorskry in die padreserwe van die pad R355 met 4,61 meter;*
- 9.18 *Die motorhuis en motor afdak asook woonstelle no. 1, 2, 3, 6, 8, 9 en 10 `n hoek van woonstel no. 5 en `n groter gedeelte van woonstel no. 4 val buite die gespesifiseerde boulyne;*
- 9.19 *Die verbeterings oorskry die toegelate dekking van die erf*

met 57 vierkante meter;

9.20 Die huidige parkeerplekke op die eiendom (7 tot hoogstens 8) voldoen nie aan die parkeervereiste van 14 parkeerplekke nie.”

7] The defendant, in his plea and further particulars to the plaintiff's request in terms of Rule 21(2) of the Rules of Court, acknowledges the bulk of these defects upon the plaintiff's complaint to him and attempted to fix them. However the workmanship was shoddy and the problems persisted; some of the defects are irreparable as the experts' evidence will demonstrate.

8] Plaintiff testified that had he known of these defects he would not have purchased the property. He, his wife and some occupants suffered electric shocks when they showered and when they used electrical appliances. Notwithstanding the fact that the defendant, a qualified electrician, issued his own Certificate of Compliance (irregularly it must be added) in a bid to satisfy the requirements of Act No 85 of 1993 and SANS 10142-1 code, the municipal inspector on this terrain, Mr Gideon Venter, declared the electrical installations to be life threatening. The tenants of the ten flats were warned of the danger and given two weeks eviction notices after which the place was closed down and has stood empty since July 2008. As will be seen later it is this closure act which gave rise to one of the claims for loss of income.

THE EXPERT WITNESSES

Mr Attie Ebersöhn is an expert on evaluation of properties. He was tasked by the plaintiff to evaluate the property in question after

certain defects emerged. He has produced an 82 page report, complete with colour photos and annotations on the main house and the ten flats. He also spoke to this report in Court. He has valued the property at no more than R600 000-00, excluding the cost of demolition of some of the structures and carting away the rubble. If I have to summarise in one sentence Mr Ebersöhn's evidence it is this: Mr De Wit, if you want peace of mind and a long-lasting building, demolish everything and start afresh.

- 9] Mr Petrus Johannes Francois Louw is an on-contract inspector of buildings for the National Home Builders Registration Council (NHBRC) and has inspected more than 3500 buildings since 2004. His career in the building industry started in 1974. He is unquestionably an expert. He was concise in his evidence which is based on his report, reflected below:

" Verslag oor bevindings gevind Inspeksie Gedoen op 21 Maart 2011: Erf 3106, te Springbok (ook bekend as Rita's B&B)

Genbee Property Inspector bied 'n onafhanklike inspeksie-verslag op residensiële en kommersiële eiendomme, ten einde 'n betroubare verslag van die kwaliteit asook toestand van die geboue aan sy kliënt uit te wys.

Die inspekteurs van **Genbee** is gekwalifiseerde inspekteurs in die boubedryf, by wyse van 'n Tegnieke Diploma, ambagte in verskillende rigtings en affiliasies met verskeie ander organisasies – organisasies soos National Home Builders Registration Council (**NHBRC**) en International Timber Construction (**ITC** vir Oprigting van Dakkappe) ---. So is **Genbee** byvoorbeeld, vir 7 jaar reeds die Inspektoraat wat die oprigting van huise inspekteur - en méér spesifiek, vir die **NHBRC** in die Noord-Kaap, wat dus Springbok ook insluit ---. Eerstens, dien dit gemeld te word dat daar **GROOTSKAALSE onreëlmatighede** op dié betrokke eiendom teenwoordig is!---

A. **Die Ebersöhn-verslag:** Menige van die gebreke, versuim,

asook oorskrydings, wat ek heelhartig ondersteun asook mee **saamstem**, is reeds deur die Geswore Waardeerder in sy gedetailleerde verslag (met gepaardgaande foto's) gedek.

- B. Dié **Genbee-verslag** moet as **aanvullende** en **ondersteunende** kommentaar tot die Ebersöhn-verslag gesien word – dus méér spesifiek op boupraktyke, -regulasies, -standaarde, asook -afwykings gerig, ten einde nie onnodig te dupliseer nie (ook met verwysing na die gebruik van foto's), maar tog met **bevestiging** van kommentaar, of waar onduidelikeheid mag bestaan (bv verwysing na gebrek aan fondasie) as oogmerk.
- C. **Nasionale Bouregulasies:** Daar is **GROOTSKAALSE onreëlmatighede** en **gebrekkige boupraktyke** op die eiendom teenwoordig, met **vele oortredings** wat **strydig** met die Munisipale, Provinsiale, asook Nasionale Bouregulasies is!
- D. **Boulyne:** Daar is **verskeie OORSKRYDINGS** van die **vereiste 4m (sykante) en 8m (straatfront) boulyne** hier teenwoordig, wat **ONWETTIG** is. Dit beteken dat die woonhuis se garage en motorafdak, sowel as woonstelle 1, 2, 3, 6, 8, 9 en 10 tegnies **ONWETTIG** is, omdat dit in geheel, of vir die grootste deel daarvan, **buite die boulyne** val. 'n Groot gedeelte van woonstel 4 en 'n klein gedeelte van woonstel 5, oorskry ook die boulyne. Die hele grensmuur en selfs 'n hoek van woonstel 10 se struktuur, val binne die **4,61m oorskryding** van die padreserwe van die **Nasionale pad R355!**

Die **OORSKRYDINGS** is natuurlik **ONWETTIG**. Sien oorskrydings op terreinplan, vir beter kennisname, Ebersöhn-verslag, bl 38.

Verwys ook verder na die **Landmeter**, Mnr C.D. Venter, se **bevestiging** van genoemde **oorskryding** in die Ebersöhn-

verslag, bl 70.

Die huidige geboue **OORSKRY** die **toegelate dekking** – en wel met **soveel as 57m²!**

- E. **Dakke:** Dakkonstruksie is **NIE op standaard** nie - sien **NHBRC handleiding Deel 3 seksie 4 item 4-5-3** en **tekening ct4-ct5-ct6** (Let wel: **Handgemaakte** dakkappe **MOET** gespyker **EN** gebout word en **MOET** deur 'n **ingenieur** ontwerp word!). Daar is tekens van dakke wat **uitsak**. Daar is verskeie tekens van dakke wat **lek**, waarvan die **Verkoper bewus moes gewees het**; Daar is ook **NIE versterkings** (of "hurricane clips") aangebring nie; Dakke is **nie orals diggemaak** nie en '**closers**' ook **nie aangebring nie**.

Kappe slegs gespyker Daklatte nie ooral met draad of "hurricane clips" bevestig nie

- F. **Fondasies:** Daar is bewys van strukture **SONDER**, en **gedeeltelik sonder fondasie** (woonstelle 6 en 7), wat eers aan die lig gekom het **nadat** daar met herstelwerk aan die riool begin is (en dit ná klagtes van die nuwe eienaar) en dié gebrek toe eers waargeneem is toe nuwe rioolpype onder die geboue aangebring moes word.
- G. **Onstabiele Muur:** Die grensmuur by woonstel 3, is slegs 'n **enkel ry** baksteenmuur; dit het verskeie **groot krake en barste**, dit is duidelik **onstabiel** en bied „n **GROOT GEVAAR** vir inwoners – ook van die aangrensende perseel.
- H. **Ongeskik vir B&B / Self-sorg Gastehuis gebruik:** Daar is bewys van die B&B wooneenhede wat **definitief nie geskik** vir bewoning is nie: Woonstel 1, 2, 3 en 9. Ander weer is **uiters gevaarlik** (woonstel 3) of het **GEEN** (of gedeeltelik geen) **fondasie nie** (woonstel 6 en 7) wat dus ook **NIE BEWOON** mag word nie! Weens gebrekkige boupraktyke, word woonheid

8 **nie** eens as 'n "gebou" gereken nie.

Buitemuur van 16mm houtstroke kraak agv aanbouing sonder behoorlike intanding en is onaanvaarbaar groot.

Sien **National Building Regulations Act A 17 (1) (a)-(w)**

Verder, woonstel 9, wat **grotendeels ONDER die grondvlak lê** (wat **HEELWAT laer** as die **NHBRC-voorskrifte** is) en waar gevolglike **vog** dus in **mure agter muurpanele en kaste toegebou en VERSTEEK was**, hou 'n besliste **gesondheidsrisiko** in!

- I. **Riolering en Loodgieterswerk:** Hierdie aspek van die bouwerk, is **UITERS gebrekkig** en die stesel in totaal, kan **NIE behoorlik funksioneer** nie.

Die sogenaame "regstellings" wat die Verkoper aangebring het, het weinig daartoe bygedra om die probleem van die **swak en gebrekkige riolering** op te los!

Vuilwater loop in die grond in - Sien National Building Regulations Act A 17 (1) (a)-(w)

Die **helling** waarmee die riool val (langs W/S 9), is te **veel** en sal dus die water te vinig laat loop en die vaste dele sal dan agter bly wat **verstopping** sal veroorsaak. Sien **National Building Regulations Act A 17 (1) (a)-(w) spesifiek (e) en (h).**

- J. **Parkeer Vereistes:** Vir dié hoeveelheid wooneenhede, moes daar ten minste 14 permanente parkeerplekke op die perseel beskikbaar gewees het. Met die motorhuis in ag genome, sal daar beswaarlik 7 parkeerplekke ingeruim kan word, wat dus heeltemal **ontoereikend** is en verder nog geen parkeerplek vir kuiergaste laat nie. Verwys ook na die Ebersöhn-verslag, bl 37.

- K. **Buite Mure:** Volgens die **National Building Regulations Act 17 (1) (a) – (w)** kan buite-mure **nie** met houtstroke gebou word nie, as gevolg van die **mootlikheid van brand**.

- L. **Algemeen: Afwerking** is oor die **algemeen swak**, tot in sommige gevalle, **uiters swak. Barste en krake is volop**, Vir die **kenner**, is die tekens van **vorige onsuksesvolle toesmeerpogings, volop. Swak vogbeheer**, is tekenend van hierdie bouwerk.

Natuurlike grondvlak, is méér as 1.2m as die vloer van die vertrek, vog in die mure.

Swak beplanning en bouaanpaasings is gemaak waar gebrek aan voorsiening vir **stormwater**, „n besliste **oorstromingsrisiko** is.

Let wel: Oorskrydings is hier die reël, nie die uitsondering nie!

- M. **Elektrisiteit:** Alhoewel hierdie verslag hoofsaaklik oor bouregulasies & -standaarde handel, kan die **LEWENSGEVAARLIKE** gebreke wat die **elektrisiteit** betref en wat die perseel na vorige “regstellings” steeds **onbewoonbaar** maak, **NIE** buite rekening gelaat word nie! Die perseel blyk eintlik reeds vóór die kooptransaksie **onveilig vir menslike bewoning** te gewees het, toe dit nog as “Rita’s B&B” teen mark-verwante inkomste bedryf is – dit is volgens die kommentaar van die 1ste elektriese verslag, opgeneem in die Ebersöhn-waardasieverslag, bl 58.

- N. **Nama Khoi Munisipaliteit – Bou Planne en Bou-Inspeksies:** Met my besoek aan die Nama Khoi Munisipaliteit (21 Maart 2011), kon die Dorpsraad se **Bou-inspekteur GEEN bewys lewer** dat daar wel enige **goedgekeurde bouplanne en/of bou-inspeksies** op die uitgrawings, fondasies, rioolwerk, verskillende vlakke van aanbouings of dakke, ensovoorts, gedoen is nie. Niks hiervan was op lêer beskikbaar nie.

Met verwysing na die brief van Nama Khoi aan Mnr Hoffmann gedateer 20 Aug 2004, word daar melding gemaak van **bouplanne** wat **NIE goedgekeur** is nie, asook ander planne wat nog nie gelewer is nie. Nóg die planne, nóg enige opvolg korrespondensie was op lêer. Volgens die gemelde skrywe word daar in die 3de paragraaf duidelik beveel dat:

“**GEEN** gebou opgerig mag word **VOOR** die voorafgaande, skriftelike goedkeuring van die plaaslike owerheid nie. Dus u planne **MOET** eers **GOEDGEKEUR** word **VOORDAT** u met bouwerk begin.”

- **Mnr Hoffmann**, wat die **aanmaning** dus duidelik **geïgnoreer** het om planne in te dien en op goedkeuring te wag, het eenvoudig net **voortgegaan** met **onwettige boupraktyke**, asook **besetting** van geboue **SONDER** die nodige goedkeuringssertifikaat;
- Die **Bou-Inspekteursafdeling**, wat ten spyte van kennisname van Mnr Hoffmann se voorneme om met bouwerk te begin, **nie** enige **opvolg-besoek** (of besoeke) gebring het of enige sanksies ingestel het teen die **ONWETTIGE strukture** wat **sonder goedgekeurde bouplanne** (en bou-inspeksies) opgerig is en **onwettig beset** is nie.

Let wel: Menige van dié menige oorskrydings en gebreke (insluitend gepaardgaande kostes), kon wel **VERHOED** gewees het indien korrekte boupraktyke reeds **vanaf die begin af**, volgens **voorgeskrewe bouregulasies en boustandaarde** gedoen en toegepas is, asook daarna met **gereelde bou-inspeksies** opgevolg is! Hoeveel van die uitbreidings is nie ná 2004 opgerig nie?”

10] Now for the evidence of Mr Gideon Ernst Venter. The report and updated report by Mr Venter run into more than 10 pages. He gave evidence in detail and elaborated considerably on his report. As can be noted hereinafter he is extremely concerned

that the plaintiff¹ almost gratuitously exposed the lives of the occupants to danger and urged that steps be taken against them. Because Mr Venter's evidence, as with others', is uncontroverted as it is basically a default judgment I will advert only to the concluding portion of his report which states:

"Ten stotte moet in ag geneem word dat Mnr. Hoffmann, wat op sy Plumlec-sertifikaat aantoon dat hy die geakkrediteerde person is, die volgende bloot maar net gallant van Namaqua Electrical aanvar het:

- A. Dat hy mislei word deur [Mnr. X] met "gevaar zones vir kombuise", wat nie bestaan nie;*
- B. Dat hy betaal het vir werk wat beslis NIE aan die kodes, OF enige verwagtinge voldoen nie;*
EN
- C. Dat [Mnr. X] bykans R90 000-00 wil invorder (dit is R55 000 van Mnr Hoffmann en R35 000 van Mnr de Wit) – dit terwyl:*
 - Die stoof in die woonhuis NIE eens ten volle gebruik kan word nie – EN verder, dat dit in elk geval TOTAAL en al BUITENSPORIG OORLAAI is!*
 - Die stroombreker wat Woonstel 1, Woonstel 2, asook die Waskamer voer, BUITENSPORIG OORLAAI is (volgens sy verslag) en tog is NIKS daaraan gedoen nie.*
 - Nie eens een van die bestaande 3xgeysers op die perseel 'n deurverbindingsgeleier het nie – en waar dit vantevore, afgesien van 'n OHM lesing van ONEINDIG, steeds deur Plumlec goegekeur en 'n sertifikaat daarvoor uitgereik is, is dit STEEDS ONVEILIG!*
 - Dat [AA]² werk gedoen het wat NIE aan die kodes OF enige verwagting voldoen nie – EN hul selfs sover gegaan*

¹ Mr Hoffman and Mr X, Mr X is not party to this proceedings, did not testify and has had no right to response. Hence his anonymity.

² Identity remains undisclosed.

*het om 'n Sertifikaat van Nakoming daarvoor uit te reik!
Oor die GRUWELIKE en VANDALIGE SKADE aan
VERSKILLENDE mure wat deur [AA] se "regstellings"
veroorsaak is, kan 'n mens maar net absoluut verstom
bly staan!*

- *Die Wet is baie duidelik dat GEEN Sertifikaat van Nakoming uitgeruikl MAG word indien daar slegs 'n ENKELE fout in die installasie bestaan nie – en waartoe [Mnr. X] hom, as geakkrediteerde person, ook self verbvind het (vewys na diè inskrywing op die laaste bladsy van [AA] se foute-verslag aan Mnr Hoffmann).*
- *Na die uitwysing van menige elektriese gebreke – waarvan sommige selfs LEWENSGEVAARLIK is en NIE aan SANS kodes voldoen nie, sal dit egter aan die Hof se diskresie oorgelaat moet word om te beslis of een, of dalk albei van die twee geakkrediteerde lede, nalatig was in die uitvoering van hul pligte."*

11]Mr Carel David Venter, who could not be present deposed to an affidavit to the effect that he is a qualified Land Surveyor since 1986, was registered with PLOTTO since 1989 and a member of SAG1. He confirms that the perimeter boundary wall encroaches beyond the surveyed approved line by almost 4 meters. That one of the buildings juts beyond the perimeter boundary by 0,82m. That both buildings depicted on the sketch (that was discovered) stretch beyond the permissible building line restrictions.

12]It was common cause that no approved plans for the building could be located. The defendant did not discover or produce any nor could any be found in the custody of the municipality. On this evidence it is evident that the plans would not have

been approved in any event if all the information was disclosed.

THE LAW

13] Clause 13.2 has a voetstoots provision that stipulates:

"13.2 Die eiendom word hiermee voetstoots en onderhewig aan alle bestaande serwitute, titelvoorwaardes en alle ander voorwaardes wat mag bestaan verkoop. Die Verkoper is nie verantwoordelik vir enige tekorte nie en sal geen voordeel daaruit trek indien die eiendom by heropmeting groter is nie."

14] The legal position that currently obtains relating to voetstoots stipulations has been set out by the Appellate Division in **Van der Merwe v Meades** 1991(2) SA 1 (A) at 8B-f. The headnote captures the principle thus at 1F-G:

"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."

The Court at 8C-D quoted the following dictum with approval in **Knight v Trollip** 1948(3) SA 1009(D) at 1013 where the following was held:

"I think it resolves itself to this, viz. 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 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. In general, ignorance due to mere negligence or ineptitude is not, in such a case equivalent to fraud."

15]The facts which are uncontroverted or common cause on whether the plaintiff was defrauded are the following:

- 16.1 The defendant bought the property in question as vacant land in 1994;
- 16.2 The improvements on the property were all brought about by the defendant and he remained owner thereof until he sold the property to the plaintiff during 2007/2008;
- 16.3 The defendant is a qualified electrician and accredited to issue a Certificates of Compliance (COC) in terms of the Electrical Installation Regulations, 1992, as envisaged in the Machinery and Occupational Safety Act, 1983 (Act 6 of 1983). The defendant is therefore not a layman when it comes to the building industry;
- 16.4 Some of the buildings were not supported by any foundation or none to speak of. The evidence of the experts suggests that extensions to the original building(s) were made over the years. I cannot see how defendant could have been unaware of the defects, some of which are glaring;
- 16.5 The Seeff agent, Valerie Myburgh, did not point to any defects, but more importantly, the defendant in discussion with the plaintiff before the purchase and transfer of the property, disavowed any defects, some of which he (defendant) made feeble attempts to fix. It must be noted that it is not suggested that the Seeff agent was aware of the defects.
- 16.6 The admitted electrical defects, which are in the defendant's field of specialization, were unquestionably

known to the defendant because enquiries conducted established that even some of the occupants of the flats received electric shocks.

16.7 The buildings were erected without any plans having been approved. There is no chance now of them being approved because, as shown, a multiplicity of rules were flouted.

16.8 I am unable to perceive how the improvements on the property which are destined for demolition, partly or in total, cannot be said to have had serious defects and that the plaintiff has no right of recourse.

16]I am satisfied that the defendant was acutely aware of the defects, possibly from the time that the first building was put up, and that he has deliberately withheld this information from the plaintiff and has therefore defrauded him.

Plaintiff must therefore succeed in the respects set out below.

17]In prayer 3 the plaintiff claims R97 640-00. This amount is made up as follows: Transfer legal costs - R13 040-00 plus transfer duty paid to the Receiver of Revenue R84 600-00. See para 3 (above). Plaintiff is entitled to recover these damages and has made out a proper case for its recovery.

18]As far as prayer 6 is concerned: The claim for the amended R162 000-00 relates to the damages that the plaintiff claims to have suffered for the 12 months from July 2008 to June 2009 when the action was instituted. The amount is calculated at R13 500-00 per month. The rate is based on what the tenants or occupants each paid per month (about R1600-00 per

month each) and what would reasonably be derived from the main house (about R2 500-00 per month) less expenses for the rates, water, electricity and the upkeep for the house. I am prepared to allow this claim.

19]As regards claim 7: The plaintiff claims the same rate of R13 500-00 per month after the date of issue of the summons which has to be July 2009 (not June 2009 as this month would be duplicated) to date of this order which shall be taken as the calendar month of November 2011: 29 months X R13 500-00 – R391 500-00.

By parity of reasoning as in para 20 (above) this claim is also allowed.

20]**On the question of costs:** They should follow the result. Clause 16.5 of the sale agreement makes provision for costs to be paid on the punitive scale. These costs will include the costs of the postponement of the trial from 01-03 November 2010 at defendant's request. I am also satisfied that the three expert witnesses were necessary witnesses and are entitled to their qualifying fees.

21]**In the result I make the following order:**

1. Bevestiging van kansellasië van die ooreenkoms, aangeheg as **AANHANGSEL "A"** tot die eiser se Besonderhede van Vordering;
2. Terugbetaling van die bedrag van R1 800 000-00 teen

lewing van die eiendom, meubels en toebehore soos beskryf in **AANHANGESEL "A"**;

3. Betaling van die bedrag van R97 640-00, synde die kostes verbonde aan die oordrag van die eiendom;
4. Dat die Verweerder gelas word om alle nodige stappe te neem en dokumentasie te onderteken wat nodig mag wees ten einde effek te gee aan die bepalings van voormelde bedes;
5. Dat die Balju of sy adjunk gemagtig word om alle stappe te neem en dokumentasie namens die Verweerder te onderteken wat nodig mag wees ten einde effek te gee aan die bepalings van voormelde bedes indien die Verweerder sou weier of versuim om sodanige stappe te neem of dokumentasie te onderteken;
6. Betaling van die bedrag van R162 000-00 as synde skadevergoeding vir die tydperk Julie 2008 tot Junie 2009, as synde skade gely deur die Eieser weens verlies aan huurinkomste;
7. Betaling van die bedrag van R391 500-00 vir die tydperk Junie 2009 tot November 2011 as synde skade gely deur die Eiser weens verlies aan huurinkomste;
8. Koste van die geding op prokureur en eie kliënt skaal, insluitende die koste van die uitstel van die verhoor vir 01-03 November 2010.
9. Die volgende getuies word as noodsaaklike getuies geag

en is geregtig op hulle deskundige kwalifiserende fooie:

**Mnre Attie Ebersöhn, Petrus Johannes Francois
Louw en Gideon Ernst Venter.**

F DIALE KGOMO
JUDGE-PRESIDENT
Northern Cape High Court, Kimberley

On behalf of the Appellant: **Adv Z Grundlingh**

Instructed by: Engelsman Magabane Inc.

On behalf of the Respondent: No Appearance

Instructed by: