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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

**Reportable
Case No: 13451/2017**

In the matter between:

THOMAS JAMES FITZPATRICK	First Plaintiff
WINNIFRED ANN FITZPATRICK	Second Plaintiff
and	
SEAN ADRIAAN LATSKY N.O.	First Defendant
ROBERT SOUTHERN N.O.	Second Defendant
ZADOK PROPERTIES CC	Third Defendant

Heard on: 11, 12, 14, 18 & 19 November 2024; 27 – 29 January 2025; 2 – 3 April 2025 and 10 December 2025

Delivered on: 25 February 2026

Summary:

Absolution from the instance — Test restated— At close of Plaintiffs' case — Whether evidence exists upon which a court, applying its mind reasonably, *could or might* find for plaintiff — Plaintiff must adduce prima facie evidence on **each essential element** of at least one pleaded cause of action — Court does not weigh probabilities or determine credibility at this stage except where testimony is palpably false.

Misrepresentation — Estate agent — General statements (aesthetic commendation) describing property as being in “stunning” or “beautiful” condition is puffery — not an assertion of structural integrity or plan compliance — Such statements not amounting to representations of **fact** concerning latent structural integrity, regulatory compliance, or absence of latent defects — no deceptive omission or lack of reasonable grounds shown on plaintiffs' version — No actionable misrepresentation established.

Latent defects — Knowledge — Evidence that defect was not apparent to a layperson — Absence of proof that estate agent knew of defect or was under a legal duty to discover it — No prima facie case of negligent or wrongful misrepresentation.

Estate agents — Duty of disclosure — Scope — Duty limited to material facts within agent's **knowledge** — No general duty to conduct technical investigations to uncover latent structural defects absent special circumstances.

Consumer Protection Act 68 of 2008 — Sections 5, 29, 41, 48, 52, 61, 113 — Requirement of prima facie proof of statutory contravention — Failure to establish misleading representation, deceptive omission, or lack of reasonable grounds — estate agent's marketing conduct considered within CPA; once-off private seller excluded by s 5(2)(b); s 113 derivative and dependent on a predicate contravention by the agent — Section 61's supply chain confinement — CPA claims failing.

Building plans — Approved plans existing — Allegation that building works did not comply with approved plans — Non-compliance not establishing misrepresentation in absence of proof that compliance was represented or that non-compliance was known.

Voetstoots — Fraudulent non-disclosure — Onus — Purchaser required to prove seller's **actual knowledge** of latent defect and **deliberate concealment** — Fraud not lightly inferred — expert evidence indicates latent defects not apparent to a layperson — Repairs or maintenance insufficient to found inference of fraud — Claim failing.

Quantification — *actio quanti minoris* requires reasonable and necessary cost to cure to plan-compliant standard; replacement/upgrades are not the measure.

Evidence — Plaintiff calling opposing party as witness — General rule that party is bound by evidence so adduced unless palpably false — Evidence not curing deficiencies in plaintiff's pleaded case.

Declaratory order —The Plaintiffs’ alternative request for a declaratory order under **CPA s 52** (Claims **C** and **H**) — s 52 operates only in proceedings concerning a **supplier–consumer** transaction; the once-off private seller is excluded by **s 5(2)(b)**; —as regards the agent/CC, s 52 is remedial and presupposes a **predicate contravention** (e.g., **ss 41/29**), which is not made out at the close of the Plaintiffs’ case — **s 113** cannot attach derivative liability to the seller and no just and equitable relief under s 52 is competent on these facts.

Costs — Magistrate’s Court jurisdiction — Contractual consent — Consideration weighed — Complexity of litigation, multiple causes of action, expert evidence, and duration justifying High Court costs — Successful defendants entitled to costs on Scale B.

ORDER

1. Absolution from the instance is granted in favour of the First, Second and Third Defendants in respect of all claims.
2. The Plaintiffs are ordered, jointly and severally, to pay the Defendants’ costs of suit, including the costs of the application for absolution on Scale B.
3. The costs occasioned by the postponement of 27 August 2024 are ordered to be costs in the cause.

JUDGMENT

ANDREWS, AJ:

Introduction

[1] This is an application for absolution from the instance in terms of Rule 39(6) of the Uniform Rules of Court, brought at the close of the Plaintiffs’ case. The Plaintiffs seek delictual and statutory relief arising from the collapse of an upper wooden deck at a Marina Da Gama property, some seven months after transfer and occupation thereof. The claims are advanced against: (i) the estate agent and his close

corporation; and (ii) the seller. The estate agent and seller are cited via their respective executors.

Factual Background

[2] On 8 October 2013, the property was appraised for the Second Defendant (“Mr. Southern”) by an estate agent (“Mr Latsky”). Mr Latsky subsequently informed the First Plaintiff (“Mr Fitzpatrick”) about the property and arranged for both Plaintiffs to view it. In terms of the Offer to Purchase (“OTP”), Latsky Properties was the effective cause of the sale being concluded. The Plaintiffs proceeded to sign the OTP, securing the property for R1,550,000 from the Second Defendant. The Plaintiffs occupied the property on 31 January 2014.

[3] The wooden deck which had been erected at the property collapsed on 18 August 2014. The Plaintiffs asserted that no latent defects were disclosed to them at the time when they signed the OTP. No defects were recorded in the OTP. According to Mr Fitzpatrick, Mr Latsky did not convey to him all the facts relating to the property that were reasonable within his personal knowledge and material to him.

[4] Central to the Plaintiffs’ case is an alleged representation by the estate agent, Mr Latsky, that the property was in “stunning/beautiful” condition and that no remedial work would be required. The Plaintiffs elected to call Mr Latsky as a witness who passed away shortly after testifying. Mr Latsky denied any structural assurances and explained that his comments concerned the evident renovations and aesthetics. He also testified that he asked the seller, Mr Southern, about defects and none were disclosed. The Plaintiffs averred that the upper decks and corresponding decks were erected and constructed without approved plans. Plans for the property existed, despite an assertion in the Plaintiffs’ pleadings and viva voce evidence that there were no approved building plans. The experts contended that the decks as built did not conform to those plans or to National Building Regulations standards.

[5] The Defendants seek absolution on the footing that no prima facie case exists on any pleaded cause of action.

Test for absolution

[6] It is trite that absolution is granted sparingly, but in the interests of justice when the Plaintiff has failed to adduce evidence on an element essential to a cause of action. The question is whether there is evidence on which a court, applying its mind reasonably, could or might find for the Plaintiff, not whether it should. At this stage, the court does not weigh probabilities or resolve credibility disputes, save where the evidence is palpably false. The Supreme Court of Appeal (“SCA”) confirmed the test for absolution from the instance in *De Klerk v Absa Ltd and Others*¹.

The Plaintiffs’ Claims

[7] The Plaintiffs’ claims are essentially predicated on the following assertions, namely:

- (a) that the First/Third Defendant had represented to them that the property was in pristine condition and that the property would not require any remedial work in respect thereof;
- (b) that the First/Third Defendants’ representations were wrongful and were made negligently prior to making the aforesaid representations, in that First Defendant, alternatively Third Defendant, failed to take any and/or proper steps to establish the condition of the upper and lower decks; and

¹ 2003 (4) SA 315 (SCA) para 10, ‘[10] The correct approach to an absolution application is conveniently set out by Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) at 92E – 93A:

‘[2] The test for absolution to be applied by a trial court at the end of a plaintiff’s case, was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G – H in these terms:

“... (W)hen absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T).)”

This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G – 38A; Schmidt Bewysreg 4th ed at 91 – 2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is “evidence upon which a reasonable man might find for the plaintiff” (Gascoyne (loc cit)) – a test which had its origin in jury trials when the “reasonable man” was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another “reasonable” person or court. Having said this, absolution at the end of a plaintiff’s case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interest of justice.’

- (c) establish whether or not the upper and lower decks had been constructed and erected in accordance with approved plans.

[8] As a consequence of the First/Third Defendant's negligent and wrongful misrepresentations, First and Second Plaintiffs were induced to conclude the sale agreement and purchase the property for the sum of R1 550 000. The Plaintiffs' case is essentially rooted in the Consumer Protection Act² ("CPA") and pursues eight separate claims instituted in the alternative, namely

- (a) **Claim A:** As against the First Defendant, alternatively the Third Defendant on the basis of their misrepresentations;
- (b) **Claim B:** As against the First Defendant, alternatively the Third Defendant in terms of Section 61 of the CPA;
- (c) **Claim C:** As against the First Defendant, alternatively the Third Defendant in terms of Section 52 of the CPA;
- (d) **Claim D:** As against the First Defendant, alternatively the Third Defendant for failure to comply with its statutory obligations imposed on it in terms of the CPA;
- (e) **Claim E:** As against the Second Defendant for fraudulent non-disclosure;
- (f) **Claim F:** As against the Second Defendant based on a contractual claim arising out of fraudulent non-disclosure;
- (g) **Claim G:** As against the Second Defendant based on Section 113 of the CPA and
- (h) **Claim H:** As against the Second Defendant based on Section 52 of the CPA.

Summation of the evidence

[9] The Plaintiffs on whom the evidentiary burden rested called seven witnesses, namely, Mr Thomas James Fitzpatrick ("Mr Fitzpatrick"), First Plaintiff; Mrs Winnifred Ann Fitzpatrick ("Mrs Fitzpatrick"), Second Plaintiff; Mr Quentin Larry Carelse ("Mr Carelse"), Senior Building Inspector for the City of Cape Town; Mr Jaco Hattingh ("Mr Hattingh"), General Manager for Legendary Retail Brands; Mr Jacob Beute ("Mr Beute"), Civil Structural Engineer; Dr Shaun Ardendorff ("Dr Ardendorff"), Architect and Mr Adriaan Latsky ("Mr Latsky"), estate agent.

² Act 68 of 2008.

[10] Mr Fitzpatrick described the marketing process, the viewing, the offer to purchase (“OTP”), and his understanding of Mr Latsky’s statements. He accepted that the property presented well and had been renovated. He testified that he trusted Mr Latsky’s experience and did not request a technical inspection as a condition in the OTP. He conceded that the OTP provided a limited window within which the offer could be withdrawn, which was not exercised. He confirmed that the deck failed after seven months. He obtained quotations from contractors, most of whom recommended replacement rather than repair. He also pursued complaints with the Estate Agency Affairs Board (“EAAB”).

[11] Mrs Fitzpatrick corroborated the viewing and the general tenor of Mr Latsky’s comments. She interpreted “stunning” as meaning safe to occupy without remedial work. She accepted that multiple visits occurred prior to taking occupation and that no overt structural risks were observed by them as laypersons.

[12] Mr Latsky testified that he used aesthetic commendation, reflecting renovations. He did not provide structural assurances or professional engineering opinions. He stated that he had asked the seller, Mr Southern, about latent defects, but none were disclosed. He stated that, under the then applicable Estate Agency Affairs Act ³(“EAAA”), he disclosed what was within his personal knowledge and did not undertake technical investigations.

[13] Mr Carelse and Mr Beute testified to non-compliance with National Building Regulations standards and plans, as well as latent defects not visible to a layperson. The Contractors recommended replacement of the decks, some refusing to work on the structures. The Plaintiffs obtained quotations. The experts emphasised that the defects would not readily have been detected by ordinary purchasers.

Ad Claim A: Misrepresentations in relation to the First and Third Defendants

[14] In respect of Claim A, the Defendants denied *inter alia* that:

³ Act 112 of 1976.

- (a) He represented that the property would not require remedial work;
- (b) There was a duty upon him to establish the condition of the upper and lower decks or any other part of the property;
- (c) There was a duty upon him to establish whether the upper and lower decks or any part of the property had been constructed and erected in accordance with approved plans and
- (d) The Plaintiffs were induced and they suffered damages.

[15] The Plaintiffs placed reliance on the evidence of Mr Latsky, who confirmed having said that the house was in a beautiful or stunning condition. The Plaintiffs understood this to mean that they would not need to do any form of remedial work to the house, as Mr Latsky emphasised that they could just move in and live. Mr Fitzpatrick testified that he had no reason to doubt Mr Latsky and accepted that the property was structurally sound. Mr Fitzpatrick testified that Mr Latsky did not convey to him all the facts relating to the property that were reasonable within his personal knowledge and material to him. He was not provided with a defects list and the OTP indicated no latent defects. Similarly, Mrs Fitzpatrick testified that she understood Mr Latsky's remark that the property is in a stunning condition to mean that it was beautiful and safe to move into without work. She stated that it never occurred to them that something substantial could be wrong.

[16] Mr Fitzpatrick held the opinion that because Mr Latsky had sold over 400 properties and had been in the industry for about 20 years, he should have known, and did know, about the defects. Mr Latsky mentioned that everyone knows decks in the area give trouble, which was something he had not mentioned previously. When Mr Fitzpatrick was asked about whether there were other properties with deck problems, he mentioned two other properties, one where the deck had collapsed after it was sold, and the new owners had to do work, and the other where the deck had to be replaced. He did not ask Mr Latsky about this and neither did he mention anything about this to Mr Latsky.

[17] It was argued on behalf of the Second Defendant that Mr Latsky cannot be said to have failed to comply with his duties as regards the existence of latent defects in respect of the sale of the property. The evidence on record is that Mr Latsky explained that he asked Mr Southern about the existence of defects, and that

Mr Southern informed him there were none. Mr Latsky explained that had Mr Southern informed him of the defects, he could have included the existence of such defects in the sale agreement.

[18] The Plaintiff however, challenged the accuracy of this submission in reference to the actual evidence:

Question: 'Did you at any time during your short assessment inquire from Mr and Ms Southern if there were any concerns about the decks?'

Answer: 'I did not specifically ask him, you know, obviously, I said to him, there is a clause, special conditions, if there is anything that is not correct, then they should mention it.'

[19] In addition, the Plaintiffs argued that Mr Latsky did not do a proper assessment, as it was a quick visit. In this regard, reference was made to the testimony by Mr Latsky as follows:

Question: 'So you know where to look?'

Answer: 'Well, you know, obviously it was such a quick visit because I just gave them a valuation...'

Question: 'When you were called in, did you have a proper look at the decks?'

Answer: 'You know, it happened so quickly because I just had to give him an indication of the value, we did not probably do a proper assessment of you know whatever. I do not know, but I gave him a ballpark figure of what he could expect to get for the place.'

Question: 'Did you inquire from Mr and Ms Southern if they repaired the deck at any stage?'

Answer: 'No, they never mentioned anything, because, you know, as I said, it happened in such a short space of time, I took Fitzpatrick through just after I looked at the value of the property.'

Question: 'Would inspecting decks be part of your normal procedure in assessing?'

Answer: 'Ja, in a normal situation where I get a sole mandate, specifically now with this new law, the mandatory disclosure, you obviously need to inspect everything, you know, so you need to disclose it. ...I never had a mandate, I just went pop in to give them more or less evaluation so they know where they stood.'

Question: 'Would you say that it was still part of your responsibilities to have had a proper look at the decks?'

Answer: 'That is a difficult question. The offer was accepted before I could do that, because, as I said, there was no mandate given to me. There was no written mandate that, you know, that I can market their place or advertise it, there was no advertising done, nothing. So, it happened so quickly, because I know they were very desperate to get a property, and I gave them first option.'

Question: 'Did you ask Mr and Mrs Southern about any latent defects in the property?'

Answer: 'Ja, I specifically mentioned, well, it is in the contract, you know, that if there is any latent defects, they must disclose it under the voetstoots clause special conditions, and obviously, they did not mention anything.'

Question: 'Did you enquire from Mr and Ms Southern if they maintained his decks?'

Answer: 'You know, that day when I went through there, everything looked good, because, you know, obviously, that is one of the only properties that was revamped. So, they had a new kitchen, new everything, you know, and it looked good, you know, so I could not pick up anything really. It was normal and very good, because sometimes you get into properties and it is such a mess, you know so.'

[20] The Second Defendant argued that whilst Mr Latsky accepted that there was a duty on him to disclose all the correct facts concerning the property which were within his knowledge, and not make a misrepresentation to the Plaintiffs and whilst the representation which Mr Latsky made to the Plaintiffs that the property was in a stunning condition, was not false, the evidence demonstrated that he did not breach that duty. The wrongfulness of Mr Latsky's representation was therefore not established.

[21] The Plaintiffs, on the other hand, argued that in considering the evidence of Mr Latsky in relation to the relevant part of the Code of Conduct referred to by the Second Defendant, the First and/or Third Defendant breached the duty to disclose and the duty not to make representations or false statements. It was mooted

that the evidence demonstrates that the First and/or Third Defendant's representation was wrongful.

[22] The Plaintiffs relied on Mr Latsky's description "stunning/beautiful condition" and an alleged assurance that no remedial work would be necessary. Mr Latsky admitted the aesthetic descriptor but denied structural assurances or that he was aware of any structural problems. The Plaintiffs themselves understood "stunning" to mean "in good nick" and accepted that the property had been renovated. They did not insert conditions for technical inspection or for the provision of plans, nor did they withdraw the offer during the cooling-off period provided by the OTP.

[23] The Plaintiffs argued that it can be deduced from the evidence that a reasonable estate agent in the position of Mr Latsky would have foreseen the possibility of his representations being incorrect, as it was clearly not truthful. In this regard, Mr Latsky unequivocally stated on numerous occasions that he did not do a proper assessment, as he was only to provide Mr Southern with a valuation of what he could expect to get for the property should the property be put on the market. He further stated that he did not inquire from Mr Southern regarding the decks nor did he have a proper look at the decks.

[24] It was argued, this Mr Latsky's representation could not have been truthful as he did not have all the facts regarding the decks or the property in general. Neither did he take any steps to ascertain all the facts regarding the decks, or the property in general, as he was in a position to do so. Mr Latsky was therefore duty-bound, as an estate agent who sold the property to the Plaintiffs, to do so before he made a statement that "no remedial work would be needed".

[25] Thus, so it was argued, the Plaintiffs demonstrated that the First and/or Third Defendant made a representation about the property in circumstances where First and/or Third Defendant did not have reasonable grounds for believing that the representation was true due to the fact that he did not properly assess the property. As such, the Plaintiffs contended, the representation was made negligently.

[26] The Second Defendant argued that if the court accepts that there is no evidence that Mr Latsky's representations were false, then it cannot be said that a reasonable estate agent in the position of Mr Latsky would foresee the possibility of his representations being incorrect, since they were truthful. It was submitted that the evidence demonstrates that, having regard to the truthful nature of Mr Latsky's representations, there is no basis to contend that he should have refrained from making the statement or taken the steps which the Plaintiffs contend he ought to have taken.

[27] During cross-examination, Mr Fitzpatrick was asked whether he expected Mr Latsky to obtain a building surveyor's report to determine whether there were any defects in respect of the property. His response was that Mr Latsky was a professional with 20 years' experience and could "assess a house in minutes". Mr Fitzpatrick further stated that the EAAB required Mr Latsky to prepare a defects list, but that he had failed to do so in respect of the sale agreement. Whilst Mr Latsky confirmed that no defects list was provided, he stated that the EAAA did not provide a similar obligation on estate agents to provide disclosure forms or a defects list as provided for in the Property Practitioners Act.

[28] Mr Fitzpatrick, testified that he addressed a complaint under the CPA, in which he complained that "*[n]o defects list or plans or any other documentation was supplied by the agent, Adriaan Latsky.*" ⁴ During cross-examination, Mr Fitzpatrick confirmed that clause 15 of the sale agreement provides for "other conditions" and that there were no additional conditions that were inserted in respect of the sale of the property.

[29] Mr Fitzpatrick also confirmed that he did not request Mr Latsky or Mr Southern for the approved building plans of the property at the time of the sale. He further confirmed that there was no condition in the OTP that Mr Southern had to provide approved building plans. This was also confirmed by Mr Latsky. In fact, the evidence on record is that no request for approved building plans was made at the time of the sale agreement. As such, there was no contractual obligation to provide the approved building plans at the time of the sale of the property. It became

⁴ Trial Bundle page 131; See also Clause 11 of Offer to Purchase, page 71.

manifest through evidence that there were building plans in respect of the property which were approved on 19 April 1977.

[30] Mr Beute and Mr Carelse dealt with the structural soundness in their respective reports.⁵ They also provided extensive *viva voce* evidence in this regard. Mr Beute and Mr Carelse testified that both the upper and lower decks were built without approved plans. Counsel for the Plaintiff argued that although there were approved plans for the property, which included a top deck and a half-bottom deck, the decks were not built in accordance with the said approved plans. It was also highlighted that, inasmuch as Mr Latsky may have mentioned that he was unaware of the decks' structural problems, he testified that he did not look at the decks nor did he enquire about the decks and the maintenance thereof from Mr Southern.

[31] Mr Fitzpatrick expressed, during evidence, that he was suing Mr Latsky because he did not do his job properly in that he should have informed them of the defects but did not do so. In this regard, Mr Latsky did not enquire from Mr Southern whether there were defects in respect of the property. Mr Latsky's evidence revealed that Mr Fitzpatrick was mistaken in this respect, as Mr Latsky testified that he asked Mr Southern whether there were any defects in respect of the property that he was aware of, and that Mr Southern informed him there were none. He explicated that this was necessary because the sale agreement contained a voetstoots clause. Mr Latsky's version in this regard is consistent with:

(a) an email dated 4 May 2015, where he pertinently stated that *"[i]f there was any problem with the deck at the initial stage the sellers would have told me about the latent defects which [he] definitely would have mentioned to the purchasers"*.⁶

(b) an email dated 25 November 2015, where he mentioned that *"[t]he Southernns were not aware of any defects otherwise they would have mentioned it to [him] and [he] would have informed the purchasers of such defects."*⁷

⁵ Trial Bundle, Mr Carelse report page 367 and addendum report page 434. Mr Beute report pages 395, 397 and 483.

⁶ Trial Bundle, page 141.

⁷ Trial Bundle, page 145.

[32] The Plaintiffs, however asserted that the Second Defendant's submissions are not accurate as the evidence set out above emphatically shows that Mr Latsky did not ask Mr Southern about any defects in the property. Furthermore, it was contended that Mr Latsky was making assumptions that Mr Southern did not know about any defects in the property as Mr Southern did not testify, and could not testify, to the correctness of the statements as set out in the email of 4 May 2015 or to response of 25 November 2015.

[33] The Plaintiffs submitted that regard is to be had to the *viva voce* evidence on record regarding the decks, which they argued, makes it improbable that the First and/or Third Defendant did not at least suspect that there might be something wrong with the decks or caused Mr Latsky to make enquiries from the Southern in this regard. This is to be viewed by considering Mr Latsky's evidence about his knowledge of decks in general and about decks close to the water's edge. In this regard, Mr Fitzpatrick testified that he thought the decks needed something done to them, so he asked Mr Southern whether one could put a sander, which is a heavy machine, on the decks. Mr Fitzpatrick also testified that the decks were working, but he was thinking that he had to look at it at some stage.

[34] Mrs Fitzpatrick, on this aspect, testified that she asked Mr Southern if something was wrong with the decks as the bottom deck felt unstable, to which Mr Southern responded "no, sand and seal". It was argued that if the Plaintiffs, who had no knowledge of wooden decks prior to owning the current property, could feel something might be amiss with the decks, how much more for Mr Latsky with his extensive knowledge of wooden decks, especially in Marina Da Gama.

[35] The Plaintiffs argued that the building inspector's report and deck failure report both suggested that the defects were structural defects that had existed since the original construction and were non-professional and neglected defects. This factor is therefore to be taken into account when considering the response from the EAAB in rejecting the complaint lodged by Mr Fitzpatrick that *"[t]he estate agent is only required to convey to a buyer all facts concerning the property which are, or should reasonably in the circumstances be, within his personal knowledge"*

[36] During cross-examination, Mr Fitzpatrick confirmed that he had a duty as a purchaser to fully inspect the property prior to purchasing it. He stated that when he inspected the property, prior to the sale, he accepted that the decks were good enough and useable as they were. Mr Fitzpatrick explained that he lodged a complaint with the EAAB because he was of the view that Mr Latsky was derelict in his duties. The EAAB refused to investigate the complaint further, stating that *“it is difficult to comprehend how the estate agent [could] be liable for a seller’s declaration, ie (sic) clause 11, even if it is misleading, so as to have had contravened clause 5.2 unless of course he knew of these structural problems.”*⁸

[37] This decision was predicated on the fact that at the time of sale, no latent defects were disclosed in the OTP as per clause 11. The legal officer who penned the email reasoned that with no defects known at the time, there could not be a list of defects drawn by the agent. Consideration was given to the assertion that the agent contravened clause 4.1.1. of the Code of Conduct which required an estate agent to convey to a buyer all facts concerning such property as are or should reasonably in the circumstances be within his personal knowledge and which are or could be material to the prospective buyer. After having perused the builder’s inspection report as well as the deck failure report, which seemed to suggest that the structural defects existed since the initial construction, the legal officer concluded that same were “non-professionally designed and neglected defects”. In addition, the legal officer, indicated that clause 4.1.1 of the Code of Conduct did not require an estate agent to actively uncover latent defects. In amplification, the writer expressed that “an estate agent is not expected to know everything about a property. He is not expected to be a construction expert or to be acquainted with all the technicalities relating to the property development, unless there are obvious defects which cannot be ignored.”

[38] After analysing the evidence, which was provided to him, he found that there was “no evidence provided that these latent defects were visible at the time of the sale.” This, after the Plaintiffs visited the property at least 4 more times after the initial viewing, with the defects going unnoticed. It was highlighted that the defects

⁸ Trial Bundle, page 152.

were only reported several months after taking occupation, with no evidence to suggest that same was detected when the Plaintiffs took occupation of the property.

[39] Mr Latsky testified that he had no reason to question that the property had been constructed and erected in accordance with approved building plans. He also explained that the property was assessed by Standard Bank, who did not report the existence of a defect in respect of the property. It came to light that Mr Latsky owned property in Marina Da Gama, near to the property in question. His property also had a wooden deck and the original wooden deck was still in good condition. Therefore, he had no reason to have foreseen any defects in respect of the decks. Mr Fitzpatrick reasoned that because Mr Latsky himself owned property close to theirs, he would have been aware of the wooden structures on properties, more especially as his property was also north-facing. Mr Latsky explained that the maintenance of decks, especially on the north-west side of the water, is an important issue to owners.

[40] Counsel for the Plaintiffs made the supposition that Mr Latsky's own evidence suggested that he did not act with reasonable care in establishing the correctness of his representation as he was aware that the decks in Marina Da Gama did not last long. He stated that painting decks caused an obstruction as one could not see if the decks were maintained. Mr Latsky did not enquire from the Southern's if they maintained the decks despite the painted 'obstruction'. He noticed that the bottom deck was not made of meranti wood. It was argued that notwithstanding all this knowledge, Mr Latsky still chose not to take any steps to ascertain what the condition of the decks were. It was suggested that all Mr Latsky had to do was to ask Mr Southern the relevant questions regarding the decks, especially because the decks relate to the safety of the occupants of the property, or to properly assess the decks while doing his valuation assessment on 8 October 2013.

[41] It is uncontroverted that when the Plaintiffs viewed the property on 8 October 2013, they were aware that it was the first time that Mr Latsky had seen the property as well. Mr Latsky had only at that stage inspected the property for purposes of providing Mr Southern with a valuation. It was contended that there was

ultimately no obligation on Mr Latsky to establish the condition of the decks and to determine that they were constructed and erected in accordance with approved plans. To do so would both have fallen within Mr Latsky's role and duties as an estate agent. Mr Latsky's representations did not concern the structural design and construction of the property.

[42] The Second Defendant contended further that Mr Latsky acted with reasonable care in establishing the correctness of the representations. He inspected the property and formed the view that the property was in a stunning condition. Nothing more was required of him. As such, it was mooted, that the representation was not false and therefore, could not have been made negligently. This is underscored by the fact that there is no evidence that Mr Latsky made the representation negligently.

[43] Conversely, the Plaintiffs argued that the court is to have regard to the fact that the First and/or Third Defendant did not take any steps to try and ascertain all the relevant facts regarding the decks or any latent defects to the property. In this regard, the earlier quoted excerpts of the evidence of Mr Latsky pertaining to him establishing whether there were any latent defects, was not an unequivocal "yes".

[44] Counsel for the Plaintiffs submitted that because there was no clear answer it would appear from the response that Mr Latsky did not specifically ask the Southernns about any latent defects as the issue of latent defects, according to him clearly fell within the ambit of the "voetstoots" clause and not under the "special condition" clause. Counsel for the Plaintiffs contended that this is quite a strange answer coming from an estate agent with all the years' experience since 1996.

[45] Mr Latsky's remark that the property looked good as it was one of the few houses that had been renovated, suggested that he only looked at the fact that it was 'aesthetically new' compared to some of the other properties. This, it was argued, is not a good enough reason to not properly assess the property. Mr Latsky then went on to provide the Southernns with a valuation, knowing full well that the Plaintiffs were waiting for him as he contacted them even before he went to the

Southerns to do the valuation. Mr Latsky also knew that the Plaintiffs were looking for property on the north-west side of Marina Da Gama. The First and/or Third Defendant had to have foreseen that the Plaintiffs might have been interested in purchasing the property. Therefore, as the Plaintiffs contended, the actions of Mr Latsky by going through the trouble of phoning the Plaintiffs before he secured a written mandate from the Southernns on 8 October 2013 in respect of the property and without having properly assessed the property, raise questions. The importance of Mr Latsky to have properly assessed the property was underscored by the fact that he knew about the Plaintiffs' interest in purchasing a property. It was highlighted that, on Mr Latsky's evidence, the Southernns only wanted a valuation of the property. Mr Latsky also was aware that the Southernns were contemplating downscaling and that they wanted to settle elsewhere to retire.

[46] Therefore, in the milieu of this background, there was no "urgency" other than a self-created artificial urgency fashioned by the First and/or Third Defendant as the Southernns were still contemplating downscaling. Neither did the Plaintiffs indicate any form of urgency on their side, except for the fact that they wanted to purchase a property on the northwest side. It was furthermore contended that the failure by the First and/or Third Defendant to do a proper assessment, "as everything happened so quickly", can only be attributed to Mr Latsky's own actions, bearing in mind that he had only received a verbal mandate at that stage from the Southernns.

[47] The evidence on record is that the OTP was drafted by the First and/or Third Defendant after the Plaintiffs viewed the property and showed interest in making an offer. The Plaintiffs therefore signed the agreement first before Mr Southern signed same. It was highlighted by Counsel for the Plaintiffs that Mr Latsky provided no evidence to the effect that he had discussed the OTP with Mr Southern, except for taking the offer to Mr Southern. The question raised by the Plaintiffs was whether it was enough for Mr Latsky to say, "and he obviously accepted the offer, and he did not mention anything about any latent defects or anything like that", without discussing the OTP more particularly, the importance of the consequences of the voetstoots clause and what latent defects entailed.

[48] The essential elements which the Plaintiffs were required to prove in respect of Claim A included a false representation of fact, wrongfulness, fault (negligence), inducement, and damage. It is trite that the service to be rendered to a buyer in terms of common law, is the introduction of an owner who is willing to sell the property for the price the buyer(s) are willing to pay⁹.

[49] It is undisputed that The Estate Agency Affairs Act 112 of 1976 ("EAAA") was in operation at the time of the conclusion of the sale agreement and thus the relevant legislation to this matter. The relevant duties of the estate agents as determined by the EAAA in terms of the Code of Conduct included:

'In terms of estate agents' general duty to members of the public and other persons or bodies, an estate agent-

2.1 shall not in or pursuant to the conduct of his business do or omit to do any act which is or may be contrary to the integrity of estate agents in general;

2.2 shall protect the interests of his client at all times to the best of his ability, with due regard to the interests of all other parties concerned;

*2.3 shall not in his capacity as an estate agent wilfully or negligently fail to perform any work or duties to such degree of care and skill as might reasonably be expected of an estate agent...*¹⁰

[50] In relation to an estate agent's legal duty to disclose, the EAAA stipulates:

'4.1 An estate agent shall-

*4.1.1 convey to a purchaser or a prospective purchaser of immovable property in respect of which a mandate has been given to him to sell, all facts concerning such property as are, or should reasonably in the circumstances be, within his personal knowledge and which are or could be material to a prospective purchaser thereof*¹¹

[51] Section 5 of the Code of Conduct enjoins an estate agent not to make representations or false statements or to use harmful marketing techniques. In relevant part it states that:

'No estate agent shall –

5.1 ...

⁹ LAWSA Estate agents, paragraph 1.

¹⁰ Section 2, The Estate Agency Affairs Board Code of Conduct.

¹¹ Section 4, The Estate Agency Affairs Board Code of Conduct.

5.2 *wilfully or negligently, in relation to his activities as an estate agent, prepare, make or assist any other person to prepare or make any false statement, whether orally or in writing or sign any false statement in relation thereto knowing it to be false, or knowingly or recklessly prepare or maintain any false books of account or other records...*

...

5.5 *without derogating from the generality of the foregoing –*

5.5.1 *wilfully or negligently mislead or misrepresent in regard to any matter pertaining to the immovable property in respect of which he has a mandate;*

5.5.2 *use any harmful or misleading marketing technique or method to influence any person to confer upon him a mandate to render any estate agency service or to sell, purchase or let or hire immovable property, having regard to the general experience which such person has concerning property transactions and the circumstances surrounding the transaction or proposed transaction;*

[52] The Property Practitioners Act 22 of 2019¹² repealed the Estate Agency Affairs Act 112 of 1976 (“the EAAA”), which was in operation at the time of the conclusion of the sale agreement between the Plaintiffs and Mr Southern. It is trite that Section 67(1) of the PPA obliges an estate agent to deliver a “disclosure form” to a seller before concluding a mandate and to a purchaser before making an offer to purchase. This disclosure form must be signed by all the parties and attached to the sale agreement in terms of section 67(2). In the absence of a disclosure form, the sale agreement must be interpreted as if no defects or deficiencies of the property were disclosed to the purchaser.

[53] Under the Estate Agency Affairs Act 112 of 1976 (“EAAA”), the legal duties of an estate agent were primarily governed by the statutory framework and the accompanying Code of Conduct promulgated by the Estate Agency Affairs Board and is maintained as a regulatory instrument by the Property Practitioners

¹² **“Mandatory disclosure form**

(1) *A property practitioner must—*

(a) *not accept a mandate unless the seller or lessor of the property has provided him or her with a fully completed and signed mandatory disclosure in the prescribed form; and*

(b) *provide a copy of the completed mandatory disclosure form to a prospective purchaser or lessee who intends to make an offer for the purchase or lease of a property.*

(2) *The completed mandatory disclosure form signed by all relevant parties must be attached to any agreement for the sale or lease of a property, and forms an integral part of that agreement, but if such a disclosure form was not completed, signed or attached, the agreement must be interpreted as if no defects or deficiencies of the property were disclosed to the purchaser.”*

Regulatory Authority ("PPRA"), formerly the Estate Agency Affairs Board ("EAAB"). The Code was established pursuant to Section 8(1)(b) of the EAAA. It serves as the primary standard for professional conduct and disclosure for all agents prior to the commencement of the PPA. Key provisions include clause 4¹³ which explicitly prohibits an estate agent from wilfully or negligently making any false statement or misrepresentation. It mandates the disclosure of all material facts that are within the agent's personal knowledge or which could be established through reasonable care. Clause 5¹⁴ thereof, requires agents to protect the interests of their clients while maintaining fairness toward all other parties, including purchasers.

[54] The EAAA established a regulatory environment where estate agents were required to act with a high degree of integrity and professional competence. Agents were legally obligated to disclose all material facts within their knowledge that could reasonably be expected to influence a party's decision to purchase or sell. This included the disclosure of known latent defects in the property. The Code of Conduct prohibited agents from making false or misleading representations regarding the property's condition, value, or legal status. This duty was intended to prevent "puffery" from crossing into actionable misrepresentation. Beyond their contractual obligations to the seller, agents had a broader duty, namely that of the duty to protect the public interest, to ensure that no party was prejudiced by unethical conduct or the withholding of critical information.

[55] It was correctly pointed out that Mr Latsky, stood in a position of trust toward his principals¹⁵, the Plaintiffs, to whom he owed a fiduciary duty in terms of common law. He was therefore obliged to observe the utmost good faith¹⁶. Under Clause 4.1 and 4.3, an estate agent has a positive legal duty to ensure that a

¹³ "4. No estate agent shall— 4.1 wilfully or negligently, in relation to his activities as an estate agent, prepare, make or assist any person to prepare or make any false statement, whether orally or in writing, or sign any false statement in relation thereto knowing it to be false; 4.2 claim to be an expert or to have specialised knowledge in respect of any estate agency service if, in fact, he is not such an expert or does not have such special knowledge; 4.3 wilfully or negligently mislead or allow any person to be misled by any advertisement or representation concerning his activities as an estate agent or in respect of any property in respect of which he has a mandate."

¹⁴ "5. In his capacity as an estate agent, an estate agent shall— 5.1 have due regard to the interests of all parties concerned in the completion of any transaction or the performance of any act as an estate agent; 5.2 not do anything which is or may be unethical or which may bring the estate agency profession into disrepute."

¹⁵ *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.

¹⁶ *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 20.

purchaser is not misled. In the context of the matter *in casu*, if an agent describes a property as being in "stunning condition" while knowing (or being negligent in not knowing) of structural defects, they would have breached Clause 4.3. This breach transforms the statement from mere "puffery" into an actionable misrepresentation.

[56] Notably, Clause 4.1 includes "negligently" making false statements. This means an estate agent cannot escape liability by claiming they did not know about a defect if a reasonable agent, exercising due care, should have discovered or suspected the issue. This is particularly relevant when an agent creates a sense of urgency that prevents the purchaser from conducting their own professional inspection.

[57] Under the EAAA, the Code of Conduct was a regulatory instrument that defined "improper conduct." The duties were primarily focused on the agent's professional relationship with the parties. The duty to disclose was often interpreted through the lens of whether the agent had "personal knowledge" of a defect.

[58] Mr Latsky explained that he was *au fait* with the Code of Conduct which was applicable to estate agents at the time. He testified that he had complied with its provisions in conducting his duties as an estate agent. Section 30(e) of the EAA specifically provides that an estate agent will be guilty of improper conduct if he "*contravenes any provision of the code of conduct referred to in section 8 (b) or fails to comply with any such provision*".

[59] Mr Latsky orated that even though he has experience in valuating and assessing properties, he does not have the same expertise as a Building Inspector or a Structural Engineer. Instead, he confirmed that his duties as an estate agent, included that of assisting people to sell, buy or lease immovable property. This accords with the definition of an "estate agent" in Section 1 of the EEA which stipulates the following:

‘(vi) "estate agent"-

(a) means any person who for the acquisition of gain on: his own account or in partnership; in any manner holds himself out as a person who, or directly or indirectly advertises that he, on the instructions of or on behalf of any other person-

- (i) sells or purchases immovable property or any interest in immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a seller or purchaser therefor; or*
- (ii) lets or hires immovable property or any interest in immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a lessee or lessor therefor; or*
- (iii) collects or receives any moneys payable on account of a lease of immovable property or any business undertaking; or*
- (iv) in addition to the performance of any act referred to in subparagraph (i), (ii) or (iii)-*
 - (aa) collects or receives any moneys payable on account of a contract of purchase and sale, including any agreement or intermediate transaction as defined in section 1 of the Sale of Land on Instalments Act, 1971 (Act No. 72 of 1971); or*
 - (bb) collects or receives any other moneys, including insurance premiums, payable in respect of immovable property or any interest in immovable property or any business undertaking; or*
 - (cc) renders any such other service as the Minister on the recommendation of the board may specify from time to time by notice in the Gazette...*

[60] This court is mindful of the unique context and milieu under which the Plaintiffs purchased the property. In this regard, the Plaintiffs returned from Ireland in 2013, around the time of meeting the First and/or Third defendant; having resided in Ireland for a period of 11 years.

[61] Mr Latsky explicated that in a scenario where someone expressed an interest in purchasing a property and wished to know about the structural integrity of the property, they would have to engage with a certified property inspector, having the necessary expertise. Such a person would, in turn, conduct a comprehensive property inspection and provide a detailed assessment of the condition of a property.

[62] It was argued that it would have been unusual to request a technical report during the purchase of a residential property. In particular, the Plaintiffs would not have thought about asking for a technical report given that when the Plaintiffs returned to South Africa, they were not familiar with the practices relating to property purchases in South Africa. It was argued that the OTP did not make provision for such an opportunity.

[63] Apparent from the evidence on record is that the property was previously bought by a renovator who renovated the property and then sold it. Mr Latsky confirmed that he informed the Plaintiffs that they would not need to do anything to the property and that the property had been renovated. He explained that, having sold numerous properties in Marina Da Gama, he was of the view that the property was in beautiful condition compared to other properties which he had sold. The renovations included the modernization of the kitchen and bathroom. However, it must be remembered that the property was 36 years old and that other properties in Marina Da Gama had not been similarly renovated.

[64] It was mooted that his statement that “the property is in a stunning condition” is wide. It was submitted that such a declaration was made with the intention of convincing the Plaintiffs to purchase the property. Counsel for the Second Defendant argued that there are notable differences in the meaning of the words “pristine” and “stunning”. In this regard, the court is to have regard to the meaning in the context of property law and misrepresentation. It was mooted that the distinction between terms like “pristine” and “stunning” is critical because it determines whether a statement is a factual representation of condition or mere “puffery.” While “stunning” is often viewed as a subjective aesthetic opinion, “pristine” implies a factual state of being in original, unspoiled, or perfect condition, which can be objectively tested against the reality of structural defects.

[65] It is trite that a distinction is to be drawn between a *dictum et promissum* (a material statement of fact) and mere puffery (exaggerated praise used in marketing). The word “stunning” is generally considered as subjective as being an aesthetic valuation. However, the Plaintiffs argued that in the context of an estate agent's expertise, such words induced a belief that the property was structurally sound and required no remedial work.

[66] Counsel for the Second Defendant elucidated that the term “pristine” carries a higher evidentiary burden. To describe a property as “pristine” suggests it is in its original, perfect condition. In amplification, it was argued that if a property described as pristine is found to have “jerry-built” decks or “quick-fix” repairs as

identified by experts Mr Beute and Mr Carelse, the representation is demonstrably and factually false.

[67] There is no evidence that Mr Latsky represented that “the property was in pristine condition”, and that “the property would not require any remedial work” as alleged in the Particulars of Claim. The evidence on record is that Mr Latsky represented that the property was in a stunning condition, which is corroborated by the Plaintiffs.

[68] As correctly pointed out, the Plaintiffs bear the onus to demonstrate that the First and/or Third defendant’s representation was misleading or deceptive or reasonably likely to mislead or deceive. It was argued that the Plaintiffs were ultimately misled and deceived by the representation by stating that no remedial work would be required. The Plaintiffs, who are laypersons, understood “stunning condition” to mean the property was “in good nick” and “structurally sound.” It must however be borne in mind that Mr Latsky unequivocally denied stating that the property would not require any remedial work. In this regard, he stated that he did not make any representations about the structural design and construction of the property. In fact, neither of the Plaintiffs mentioned that Mr Latsky did so. To my mind, the advice given to “sand and seal” pertains to maintenance and cannot be elevated to structural defects more especially as a layperson would not have seen those structural defects.

[69] Counsel for the Second Defendant contended that the truthfulness of Mr Latsky’s representations is affirmed by the assessment report by Standard Bank when the Plaintiffs applied for a home loan for the property¹⁷. It is important to note that the Plaintiffs objected to the Second Defendant using the report without the report’s author being called to testify. It was argued that the Defendants cannot rely on this report. This is because the bank is not responsible for determining the structural condition of the property or for defects in the property.

¹⁷ Trial Bundle, pages 661 – 662: “*Neatly maintained 3 bedroom attached duplex with conventional internal finishes throughout.*”.

[70] In reference to The Code of Banking Practice¹⁸, the Plaintiffs contended that the only duty of the bank is to do a valuation of the property for purposes of securing the bond, also highlighting that the bank is not responsible for determining the structural quality or any defects in the property. In further augmentation of the Plaintiffs' argument that the assessment report from Standard Bank cannot be relied upon, they argued that regard is to be had to the description of what a property valuation entailed as extracted from the website of First National Bank ("FNB").¹⁹ It was also submitted that the court cannot take judicial notice of the assessment report as the Code of Banking Practices was not put to any of the witnesses.

[71] It is noteworthy that the Plaintiffs did not dispute that the property was visually appealing. It is further noteworthy that Mr Fitzpatrick confirmed that although he was entitled to withdraw from the sale agreement, they did not elect to do so and proceeded with the purchase of the property.

[72] Mr Latsky was called to testify in the Plaintiffs case and is bound by the evidence of their own witness. In his response to the letter of the Estate Agency Affairs Board dated 25 November 2015 where recounted the Plaintiffs utterances after viewing the property to the effect that *"it was exactly what they were looking for"*²⁰.

[73] According to Mr Latsky, he did not exaggerate the condition of the property and clarified that his description of the property being in a stunning or

¹⁸ "When you apply for a mortgage loan, and on request, we will make available to you written information about:

...

8.2.5 the role of your bank in appraising the property and the difference between a market valuation, the assessed security value of the property, and the minimum replacement cost placed on the buildings and improvements for insurance purposes;

8.2.6 how to get advice on the structural quality of the property, compliance with local authority requirements and replacement costs of the buildings and improvements from the proper experts."

¹⁹ "An assessor will physically visit the property to do a valuation. Should there be enough information about the property, an automated or desktop valuation can determine whether the property is good security for lending. Then, a final quote including the offer amount and interest rate is created."

²⁰ Trial Bundle, page 145.

beautiful condition related to the aesthetic qualities of the property as it had been renovated. In property transactions, commendatory language such as “stunning” ordinarily constitutes puffery. By contrast, descriptors such as “pristine/original/perfect” may imply verifiable factual content. On the Plaintiffs’ own evidence, the former was used. In my view, such statements do not amount to representations of fact concerning latent structural integrity, regulatory compliance, or absence of latent defects.

[74] Inasmuch as it was argued that Mr Latsky ought to have assisted Mr Southern in understanding the voetstoets clause and to ensure that he discloses any latent defects, there existed no general duty to conduct technical investigations to uncover latent structural defects in the absence of special circumstances. The Plaintiffs’ contestation that the First and/or Third Defendant must have known that Mr Southern, as the seller, was not protected by the voetstoets clause in the event that he fraudulently or intentionally concealed any latent defect is a sound principle in law.

[75] The court in the matter of *Maloka v Vermeulen and Another*²¹ distilled what is meant by a latent defect as follows:

‘A latent defect is any material imperfection which prevented or hindered the ordinary common use of the property.’²² It can also be described as a fault which could not have been discovered by a reasonably thorough inspection before a sale. It is a defect that only an expert would be able to identify.’

[76] The duty of disclosure under the EAAA extended to material facts within the agent’s personal knowledge. Mr Latsky is not an expert and could not have been expected to notice the defect which according to the experts was not apparent to a layperson. I am therefore not persuaded that the Plaintiffs have shown that Mr Latsky knew of any latent defects or that a reasonable agent in the circumstances was obliged to discover it prior to making aesthetic comments.

²¹ (2017/4418) [2023] ZAGPPHC 13 (5 January 2023) at para 34.

²² *Van der Merwe v Meades* 1991(2) SA 1 (A).

[77] The EAAA did not impose a duty to conduct technical investigations to uncover structural defects. In the absence of proof that the estate agent knew of defect or that he was under a legal duty to discover it there was no deceptive omission or lack of reasonable grounds shown on the Plaintiffs' version. Given the context, no actionable misrepresentation or negligence is established. Inducement is not established beyond aesthetic influence.

[78] It was argued that the First and Third Defendant's application for absolution from the instance is predicated on the 'grounds' of poor judgment and dishonesty. This court is however mindful that in terms of Rule 39(6) *"questions of credibility should not normally be investigated at this stage of the proceedings, except 'where the witnesses have palpably broken down, and where it is clear that what they have stated is not true'"*.

[79] The First Defendant challenged the veracity of Mrs Fitzpatrick's evidence to the effect that Mrs Southern told her that Mr Latsky had sworn her to secrecy regarding the defects in the property. Needless to say, this assertion is insufficient to prove deliberate concealment by virtue of the hearsay nature of such evidence which remains uncorroborated. It was also contended that this evidence conflicts with the evidence of Mr Fitzpatrick who testified that the sellers went out of their way to point out defects. It was furthermore argued that if Mr Latsky had sworn Mrs Southern to secrecy about possible latent defects, this fact would have featured in Mr Fitzpatrick's complaint to the EAAB. However, no mention hereof was made in the complaint.

[80] At this stage, the court does not weigh probabilities or resolve credibility disputes, save where the evidence is palpably false. The issue of whether Mrs Fitzpatrick accessed her garden via the neighbour's property for an entire year vis a vis Mr Fitzpatrick's evidence who testified that he crossed the deck "with fear and trepidation", with no mention of Mrs Fitzpatrick being too timid to do so, does not in my view, go to the heart of whether the Plaintiffs succeeded in establishing a prima facie case to sustain their claims. There is no disputing that the upper deck collapsed months after the Plaintiffs had taken occupation thereof.

[81] Prima facie proof is therefore lacking on one or more of the essential elements which the Plaintiffs were required to sustain their action under claim A. To my mind, there is no prima facie proof of a false representation of structural integrity or plan compliance. No prima facie case of negligent or wrongful misrepresentation has been established beyond the Code's general duties, given that: (i) the property appeared recently renovated; (ii) a bank assessment noted no structural red flags; and (iii) the decks' latent defects would not be apparent to a layperson. Consequently, I am satisfied that absolution from the instance is warranted.

Ad Claim E: Against the Second Defendant - fraudulent non-disclosure

[82] The Plaintiffs submitted that Mr Southern, as the seller, had a duty to disclose the defects in the decks to the Plaintiffs in terms of the OTP and the voetstoots clause, as he was not only aware of the latent defects to the decks but had deliberately concealed this from the Plaintiffs. Before this question can be answered, the court would have to consider whether the Plaintiffs have established prima facie that the Second Defendant had knowledge of the existence of the latent defect at the time of the sale.

[83] According to the Particulars of Claim, the Plaintiffs alleged that there existed a latent defect at the time of the sale of the property in that the Second Defendant was:

- (a) aware that there existed in respect of the upper and lower decks and inherent defects in their design and/or constructions; and/or
- (b) aware that the conditions of the upper and lower decks had substantially deteriorated; and/or
- (c) aware that there existed no plan approval for the erection and construction of the upper and lower decks; and/or
- (d) was aware of the First/Third Defendant's misrepresentations; and
- (e) represented to First and Second Plaintiffs that the upper and lower decks were free of defects.

[84] The Plaintiffs further alleged that the Second Defendant represented to the Plaintiffs that the upper and lower decks were free of defects. The Plaintiffs

asserted that the Second Defendant was under a legal duty, prior to the conclusion of the sale agreement:

- (a) To disclose to the Plaintiffs the material facts; and/or
- (b) Correct the First/Third Defendant's misrepresentations; and/or
- (c) Not make Second Defendant's misrepresentations.

[85] The Plaintiffs contended that Mr Southern had to have been aware of the defects, given the extent of the deterioration of the decks to the point of collapse within a period of 7 months. It was submitted that the evidence revealed that the 'quick-fix' was done during the period that Mr Southern owned and resided in the property. Therefore, as the owner, Mr Southern had to have instructed the person who did the 'quick-fix'.

[86] It is common cause that the OTP contained a voetstoots provision which stipulated that:

- '11. *The Seller warrants to the Purchaser that at the time of sale there are no latent defects in the property known to the Seller. Save for this, the property is sold VOETSTOOTS and subject to all the conditions and servitudes mentioned, referred to or contained in the title deed thereof, and any lease thereof, and in the condition and the extent such as it now lies.*²³

[87] The term *voetstoots* is a common law principle in property and contract law, meaning that a buyer purchases goods or property "as is," in their current condition, including all visible (patent) and hidden (latent) defects. It is trite that by agreeing to a *voetstoots* clause, the purchaser waives the right to hold the seller liable for defects discovered after the sale, provided the seller did not act fraudulently. In other words, the purchaser assumes the risk of any latent defects.

Applicable legal principles

[88] At common law, a purchaser seeking to escape a *voetstoots* clause is required to prove that the seller *knew* of the latent defect, and the seller *deliberately concealed* it with *dolo malo* as held in the matter of *Odendaal v Ferraris* ("*Odendaal*")²⁴. The SCA in *Odendaal* has expanded this definition to include not only physical flaws but also "non-physical" defects. The court found that the seller's

²³ Trial Bundle, page 71.

²⁴ 2009 (4) SA 313 (SCA) at para 2.

failure to obtain statutory approval for building alterations on the property constitutes a latent defect in the property. The SCA further held that if a buyer hopes to avoid the consequences of a *voetstoots* sale, he must show not only that the seller knew of the latent defect and did not disclose it, but also that he or she deliberately concealed it with the intention to defraud.²⁵ It is trite that fraud can be inferred only from clear facts. Courts do not lightly infer fraud.

[89] More recently, the matter of *Le Roux v Zietsman and Another* (“*Zietsman*”)²⁶ focused on latent defects and whether a seller is liable for fraudulent non-disclosure and misrepresentation of defects in a property. The SCA in *Zietsman* crystallised the requirements for fraudulent misrepresentation as follows:

‘To succeed with a claim based on fraudulent misrepresentation, a purchaser must show that (a) a seller (at the time of the sale) was aware of the defect; (b) the seller deliberately (dolo malo) failed to disclose the defect to the purchaser; and (c) with the aim to induce the purchaser to conclude the sale.’²⁷ Defects are latent in that they would not have been visible or discoverable upon inspection by the ordinary purchaser.²⁸

[90] The court affirmed, in the matter of *Le Roux v Zietsman and Another*²⁹, that a seller is deprived of the protection afforded by a *voetstoots* clause where fraudulent misrepresentation or non-disclosure has occurred.

[91] The matter of *Speight v Glass and Another* (“*Speight*”)³⁰ confirmed that a duty to disclose arises only where facts fall within the seller’s exclusive knowledge. In this regard, Fannin J remarked that “*a seller who knows of the existence of defects in the thing sold, but deliberately refrains from disclosing them to the buyer, is guilty of fraud...*” It was correctly pointed out by Counsel for the Second

²⁵ At para 2 ‘It is trite that if a buyer hopes to avoid the consequences of a *voetstoots* sale, he must show not only that the seller knew of the latent defect and did not disclose it, but also that he or she deliberately concealed it with the intention to defraud (*dolo malo*). 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. But as this court has said, fraud will not lightly be inferred, especially when sought to be established in motion proceedings. 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 succinctly stated.’

²⁶ (330/2022) [2023] ZASCA 102 (15 June 2023) at para 1.

²⁷ *Van der Merwe v Meades* [1991] 4 All SA 42 (AD); 1991 (2) SA 1 (AD) at 8.

²⁸ *At Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Limited* [1977] 4 All SA 94 (A); 1977 (3) SA 670 (A) at 683H-684C.

²⁹ At par 22.

³⁰ 1961 (1) SA 778 (D) at 782A.

Defendant that *Speight* remains a foundational authority for the principle that a duty to disclose only arises when the information falls within the "exclusive knowledge" of one party and has been followed by a long line of cases. The court is enjoined to look at objective factors to ascertain whether the seller deliberately concealed defects.

[92] Therefore, it was incumbent on the Plaintiff to lay a factual basis which proves fraud as it has authoritatively been held that speculative propositions will not suffice. This legal principle from the seminal judgment of *Gilbey Distillers & Vintners*³¹ is frequently cited to reinforce the rule that litigation must be based on proved facts.

[93] It aligns with the general principle that the party who asserts a fact must prove it on a balance of probabilities, as established in *Pillay v Krishna*³². The matter of *Knight v Trollip*³³ is also instructive where the court held that a seller is liable only where he actually knew of the defects and that ignorance does not amount to fraud.

[94] These decisive authorities set a high threshold for proving fraudulent non-disclosure.

Summation of the expert evidence

[95] Mr Carelse reasoned that you would not need to fix something if there was nothing wrong with it. He identified that the timber in the decks differs as some were painted and some were not. He said old timber was used and cut to fit into spaces. He explicated that, notably, there are different brackets and the paper labels

³¹ *Gilbey Distillers & Vintners (Pty) Ltd. and Others v Morris NO and Another* (193/89) [1990] ZASCA 134; 1991 (1) SA 648 (AD); [1991] 1 All SA 406 (A) (16 November 1990).

³² *Pillay v Krishna* 1946 AD 946.

³³ 1948 (3) SA 1009D. "...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 know. In respect of these defects, the seller may be 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."

would not have lasted that long should the brackets have been part of the original deck.

[96] The bottom deck, as depicted in the photo exhibits, appears to have additional vertical supporting timber underneath.³⁴ The support ends were forced up and do not rest in the metal joist hanger brackets. It was suggested that the supporting timber had to have been added before the Plaintiffs took ownership. It was argued that the previous owners must therefore have known about the structural defects in the lower deck as they attempted to address this. According to the report of Mr Carelse, the “quick-fix” intervention has rendered the lower deck even more unstable.”³⁵ The vertical support timber can be seen resting on what appears to be brick.³⁶ This, according to Mr Carelse, was part of the fix.

[97] In Mr Beute’s report, he stated that “[t]he few, scattered timber supports, standing on loose brick, sinking into the sand (a makeshift attempt to make good), was insufficient support.”³⁷ To the best of his recollection, the Lakeside Mica was only there for two or three years. The Plaintiffs placed reliance on Mr Schultz’s and Mr Scheepers’s observations as depicted in their respective quotations. They were not called to testify, and as such, this court cannot have regard thereto.

[98] Counsel for the Second Defendant, in reference to *Knight v Trollip*³⁸, submitted that from the evidence it is manifest that Mr Southern did not have knowledge that the decks were defective in their design and/or construction. It was contended that there is no evidence to suggest that Mr Southern knew or ought to have been aware of the latent defect in respect of the decks.

³⁴ Trial Bundle, page 10.

³⁵ Trial Bundle, pages 376 – 377.

³⁶ Trial Bundle, page 52.

³⁷ Trial Bundle, Mr Beute report page 484.

³⁸ 1948 (3) SA 1009D. “...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 know. In respect of these defects, the seller may be 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.”

[99] Counsel for the Plaintiffs submitted that the evidence demonstrated that Mr Southern, in fact, knew of the problems as he had a “quick-fix” repair work done based on the following evidence:

- (a) On Mr Carelse’s testimony, the top deck was installed approximately in the 1990’s and
- (b) the bottom deck was installed in or around 2004, which is based on Mr Latsky’s evidence and a photo dating back to 2001³⁹.

[100] In considering the evidence, it is not in dispute that Mr Carelse (Senior Building Inspector) and Mr Beute (Structural Engineer) conceded that a layperson, in the position of the Plaintiffs, would not have seen the defects in the decks. Mr Carelse also stated that a layperson would not have seen the “quick-fix” to the decks. This aligns with the Second Defendant’s position that even trained experts needed a destructive inspection, a lay owner could not have known.

[101] It is also not in dispute that Mr Southern resided in the property for a period of 10 years before it was sold to the Plaintiffs. The Plaintiffs themselves occupied the property for seven months and used the decks daily, including hosting guests, and noticed no defect.

Documentary evidence

[102] There was no evidence to suggest that Mr Southern knew that the decks were not built in accordance with approved building plans or in accordance with the National Building Regulations. This inference is further cemented by the evidence of Mr Carelse and Mr Beute, who confirmed that, according to the records held by the City of Cape Town:

- (a) A Notice of Completion of Building Work was completed and signed on 12 January 1978 by a Building Inspector who inspected the building works on 11 January 1978 and declared that there are no unauthorized deviations and no other outstanding requirements in respect of the building works in respect of the property.⁴⁰

³⁹ Trial Bundle, page 309.

⁴⁰ Trial Bundle, page 706.

(b) A memorandum from the City of Cape Town: City Engineer's Department dated 4 April 1078 states that an inspection of the property on 7 March 1978 reveals that all work has been completed in accordance with the approved plan number 219985.⁴¹

(c) D C Mills, a Land Surveyor addressed a letter date 1 March 1978 which certified that the buildings on erf 9[...] – 9[...]2 Portions of Erf 9[...]3 Cape Town in Marina Da Gama Township Extension No. 1, on which the property in question is situated, have been erected in accordance with and in conformity with the approved plan of subdivision.⁴²

[103] The Second Defendant contended that the City of Cape Town's records in respect of the property present a misleading narrative which would have left any lay owner of the property none the wiser regarding the decks having not been built in accordance with approved building plans or in accordance with the National Building Regulations. To my mind, this would cause any reasonable owner to believe the structures were compliant, weighing heavily against knowledge of any latent defect. I am therefore satisfied that the documentary evidence shows that the property complied with approved plans.

[104] Of seminal importance is the fact that the Second Defendant purchased the property with the decks already built. The Plaintiffs acknowledged that although Mr Southern was, for all intents and purposes, a 'layperson' himself in relation to the construction of the decks, cognisance must be had of the fact that he lived in the property for 10 years before the Plaintiffs bought it from him.

[105] It was argued that the evidence of Mr Carelse and Mr Beute regarding the fixing/repairs to the decks establishes that Mr Southern must have known 'something is wrong' with the decks as the 'fixing'/ 'repairs'/ 'quick-fix' was done between the period 2004 (when he purchased the property) and 2013 (when he sold the property).

⁴¹ Trial Bundle, page 724A.

⁴² Trial Bundle, page 724B.

[106] If regard is had to the official records held by the City of Cape Town, dating back to 1978, it reflects completion and plan compliance, which would reasonably have any lay owner to believe the structures were compliant. The decks pre-dated Mr Southern's ownership and suggest that the decks were already erected when the property was purchased from the renovator and prior owner, Mr Taylor, in 2004. There is no evidence that Mr Southern effected structural alterations thereafter or appreciated any structural defect, notwithstanding Mr Carelse's opinion that the repairs were done 3 to 5 years before the Plaintiffs took ownership of the property.

[107] Mr Fitzpatrick's evidence in this regard is telling as he testified that Mr Southern did not mention any repairs having been done on the decks on the property. During re-examination, Mr Fitzpatrick stated that Mr Southern knew about the decks as much as he did, if not less, and highlighted that Mr Southern was a layperson and thus his opinion regarding the decks would carry the same weight as his own opinion of the decks.

[108] Mr Fitzpatrick confirmed that the terms of the voetstoots clause to the extent that Mr Southern had warranted that at the time of conclusion of the sale agreement, namely 8 October 2013, there were no latent defects known to Mr Southern. When asked during cross-examination whether he accepts that Mr Southern warranted that he had no knowledge of the defects in respect of the decks, Mr Fitzpatrick stated that he was perfectly certain that Mr Southern did not know of the latent defects in respect of the decks.

[109] Mrs Fitzpatrick testified that she asked Mr Southern if there was anything wrong with the decks, whereupon Mr Southern informed her that there was nothing wrong with the decks but that they needed to be sanded and varnished. During cross-examination, Mrs Fitzpatrick stated that she does not know if Mr and Mrs Southern knew that the decks were defective.

[110] The Plaintiffs suggested that there were repairs effected on the lower deck during 2009. Mr Hattingh, who testified in his capacity as the General Manager for Legendary Retail Brands, which owns the Mica Hardware brand testified, with

reference to the photos which depicted a price tag on the bottom deck, that it is very likely that the label originally comes from the Lakeside Mica. He stated that Lakeside Mica started trading in or around January 2009 and it stopped trading as a Mica store during October 2009. He explained that Mica does not allow Mica-branded stock to be sold by a retailer trading under a different name. Further, he explained that they always try to rename stores in the same area under a different name so as to avoid customer confusion. Thus, it is unlikely that Mica stores would trade under the same name.

[111] In Mr Beute's report, he stated that "[t]he few, scattered timber supports, standing on loose brick, sinking into the sand (a makeshift attempt to make good), was insufficient support."⁴³ To the best of his recollection, the Lakeside Mica was only there for two or three years.

[112] It was submitted that the evidence led by Mr Hattingh does not take this issue further. The Plaintiffs' contentions are therefore not supported by Mr Hattingh's evidence as Mr Hattingh conceded that he could not testify as to when the Mica Lakeside price sticker as depicted on a certain piece of wood forming part of the lower deck was taken as he had never been to Lakeside before and had nothing to do with the Mica brand before 2008 whereas the Mica brand was established in 1983.

[113] It is therefore evident that the Plaintiffs' own expert, Mr Hattingh, could not place the Mica price sticker within the Southern's ownership period. On the available evidence, there is nothing to support the suggestion that the Southern's effected any structural alterations to the decks. Neither is there any evidence that Mr Southern ever commissioned structural work. This rebuts any inference that Mr Southern "must have known" about design or construction defects.

[114] It is not enough for the seller to be aware of the defects, he must also conceal them. To reiterate, the Plaintiffs themselves conceded that the Southern's lack of knowledge, as Mr Fitzpatrick was "perfectly certain" that the Second

⁴³ Trial Bundle, Mr Beute report page 484.

Defendant did not know of the latent defects. Mrs Fitzpatrick too conceded she could not say whether the Southernns knew of the defects. The Plaintiffs were required to show actual knowledge and intentional concealment. These concessions by the Plaintiffs are clearly incompatible with an inference of *dolus*, destroying any suggested inference of intentional concealment.

[115] Much of the Plaintiffs' case hinges on alleged "quick-fix" repairs. To my mind, quick-fix repairs do not establish knowledge of structural defects as repairs may be carried out for ordinary maintenance and not to fix a known structural defect. The critical nature and extent of the "quick-fix" although detailed by the experts, would not have been seen by a layperson. In fact, Mr Beute stated that a layperson would not know what the standard construction practices are in respect of decks. Mr Beute testified that the other properties alongside the Plaintiffs' property were built the same way and that none of the decks were constructed in accordance with the approved building plans.

[116] Critically, there is no evidence showing that Mr Southern himself performed the repairs or that he instructed someone to do structural repairs, or that he appreciated the structural implications. In any event, repairs may be undertaken for a variety of reasons and can reflect maintenance rather than knowledge of latent structural defects as previously stated. It is apparent that the Plaintiffs did not do any maintenance work for the 7 months that they occupied the property before the decks collapsed, as confirmed by Mr Carelse's assessment that there was a lack of maintenance of the decks.

[117] In considering whether there was deliberate concealment or misrepresentation, regard is to be had to the evidence. Mrs Fitzpatrick testified that she specifically asked Mr Southern if there was something wrong with the decks and he told her to 'sand and seal'. She further testified that it was such a quick answer, it almost felt rehearsed, especially for a man his age. To my mind Mr Southern gave a consistent and non-evasive reply and is consistent with Mr Carelse's evidence that normal maintenance would require sanding down the decks and putting oil on the decks. This, it was submitted, is consistent with what Mr and Mrs Fitzpatrick stated Mr Southern informed them when they enquired about the decks during the

inspection of the property prior to the conclusion of the sale agreement. This is also in alignment with Mr Latsky's evidence, who testified that he also owned property with wooden decks in Marina Da Gama and that he often maintained the decks by varnishing them.

[118] On a conspectus of the evidence, there was nothing dishonest in Mr Southern's reply. It must also be borne in mind that the Plaintiffs themselves inspected the property prior to signing the OTP and detected no issues and probably would not have based on the expert's testimony. I interpose to mention that the Defendants never pleaded that the deck collapsed as a result of the lack of maintenance of the decks by the Plaintiffs. This court did not understand the Second Defendant's argument to suggest that the lack of maintenance contributed to the failure of the deck. Based on the extent of the defects, the decks would have collapsed regardless of whether the Southernns had sold the property. Despite the Plaintiffs contestations regarding the admissibility of the Standard Bank evaluation, it is evident that the defects were not detected which is support by the Plaintiffs own experts and inspectors who themselves could not see any defects without scrutiny. It can therefore not be inferred that Mr Southern was aware of the defects let alone intentionally hide it.

[119] In addition, the emails and correspondence dispatched by Mr Latsky corroborate Mr Southern's lack of knowledge. In this regard, Mr Latsky testified that prior to the conclusion of the sale agreement, he asked Mr Southern about the existence of a latent defect having regard to the voetstoets clause in the sale agreement, and that Mr Southern informed him that he did not have any knowledge of any latent defects in respect of the property. This is further substantiated by:

- (a) Mr Latsky's email dated 4 May 2015, regarding a newspaper article in which he stated that *"[i]f there was any problem with the deck at the initial stage the sellers would have told [him] about the latent defects which [he] definitely would have mentioned to the purchasers."*⁴⁴
- (b) Mr Latsky's responded to the EAAB dated 25 November 2015, wherein he stated *inter alia*, that Mr Southern was *"not aware of any defects otherwise*

⁴⁴ Trial Bundle, para 3, page 141.

they would have mentioned that to [him] and [he] would have informed the purchasers of such defects.”⁴⁵

[120] These statements were made before litigation reducing any suggestion of contrivance. There is no evidence that Mr Southern had knowledge of the existence of the latent defect concerning the decks at the time of the sale. Consequently, under *Odendaal, Zietsman, and Speight*, the Plaintiffs had to prove that Mr Southern knew of the latent defect. There is no evidence to support this requirement. The Plaintiffs also failed to prima facie show that Mr Southern deliberately concealed it. Mr Southern did not display any deceitful conduct, which was affirmed through the testimony of Mr Fitzpatrick himself when he stated that Mr and Mrs Southern were “decent”. In my view, there is no prima facie evidence to suggest that Mr Southern’s actions were in any way consistent with concealment based on the Plaintiffs’ own concession that Mr Southern did not know.

[121] Thus, it cannot be inferred that Mr Southern ultimately concealed defects with the intention to induce the sale, as there were no misrepresentation and no crafted narrative. To my mind, the OTP merely recorded a standard voetstoots sale by a lay owner. Therefore, none of the elements of fraudulent non-disclosure are satisfied. Consequently, the Plaintiffs have not established a prima facie case of fraudulent non-disclosure against the Second Defendant to avert absolution in respect of claim E.

Ad Claim F: Actio quanti minoris

[122] The Plaintiffs claim an entitlement to a reduction in the purchase price of the property on the basis that the Second Defendant failed to disclose the material facts and/or correct the First and/or Third Defendant’s misrepresentations which were material to the conclusion of the sale agreement and was made deliberately; with the intention to induce the Plaintiffs to conclude the sale agreement and with knowledge that the Plaintiffs would be so induced. As a consequence of being induced for reasons asserted under claim E, the Plaintiffs averred that they are

⁴⁵ Trial Bundle, para 3, page 145.

entitled to a reduction of the purchase price of the property in the sum of R100 536.50.

[123] Mr Latsky explained that Mr Taylor purchased the property for approximately R500 000 during 2004 and renovated that property. Thereafter, the property was sold to Mr Southern for R875 000 during the same year. Mr Fitzpatrick confirmed same during evidence. In this regard, he explicated that a neighbour had informed him that prior to Mr Southern's ownership of the property, the property was bought by a renovator, who renovated the property and then sold it to Mr Southern.

[124] The evidence revealed that the Plaintiffs purchased the property from Mr Southern for the sum of R1 550 000, whereas Mr Latsky valued the property at R1 650 000. Mr Latsky explained that the Plaintiffs put in an offer to purchase the property in the amount of R1 550 000 and that Mr Southern accepted the offer because it was only R100 000 less than the property valuation.

[125] Counsel for the Second Defendant submitted that the Plaintiffs are not entitled to a reduction of the purchase price at all unless the market value of the property with the defect is less than the purchase price. It was highlighted that Mr and Mrs Fitzpatrick did not testify that the defects in the decks would have affected the amount of the purchase price that they would have paid for the property. It was further submitted that, considering the valuation of the property and the purchase price that was agreed in respect of the sale of the property, there is no expert evidence to demonstrate that the purchase price of the property would have been further reduced by the existence of a defect in respect of the decks in the amount claimed. Furthermore, it was contended that there was no evidence that the actual value could not be determined or is difficult to determine.

[126] Counsel for the Plaintiffs contended that the Second Defendant's argument regarding the sale price being R100,000.00 less than what the First and/or Third Defendant said they could ask for the property cannot be accepted. The reason for this is that Mr Southern was informed that the property is worth "probably around R 1,650,000.00". It was submitted that this amount was clearly an estimate of what Mr Southern might expect but it was not a guaranteed amount

which was evident from Mr Latsky's evidence as he used the words 'probably' and 'about'. The Plaintiffs contention was that it is possible that this amount could have been inflated by the First and/or Third Defendant to persuade Mr Southern to sell. The impression created by the immediate acceptance of the offer was that the offer was market-related. They argue further that, on Mr Latsky's own version- this was a quick valuation. The reasoning was that regardless of whether Mr Southern accepted an offer of R 1,550,000.00 it does not take away from the fact that the Plaintiffs are out of pocket in the amount of R 100,536.50 as a result of a latent defect that was part of the property at the time of the Plaintiffs making the offer to purchase the property, and of which they had no knowledge until the incident of 18 August 2014. There was thus no 'reduction' in purchase price as the price was not even 'fixed' in any form. There was no written mandate from Mr Southern to the First and/or Third Defendant, as the property was not yet put on the market.

[127] The Plaintiffs submitted that the property was bought for R 1,550,000.00 under the mistaken belief that the property would not need any remedial work. They challenge the argument preferred by the Second Defendant that they paid less for the property than what was an 'estimate market' value to make provision for a loss like this.

[128] It is trite that the *actio quanti minoris* is a legal remedy that allows a purchaser to claim a reduction in the purchase price of a thing sold due to the discovery of latent defects. To succeed with a claim based on the *actio quanti minoris*, a Plaintiff must establish the following:

- (a) Existence of a Latent Defect: The thing sold must have been defective at the date of the sale;
- (b) Quantification of Reduction: The Plaintiff must establish the exact amount by which the purchase price should be reduced and
- (c) Overcoming Voetstoots: If the sale agreement contains a *voetstoots* clause, the purchaser bears the additional burden of proving that the seller was aware of the defects and fraudulently neglected to inform the purchaser of their existence.

[129] In *Banda v Van der Spuy*⁴⁶, the issue for determination, on appeal, was whether the Respondents had knowledge that the repairs did not properly rectify the defect, which they fraudulently concealed from the Appellants. In this case, the Appellants bought a house from the Respondents. The house's thatched roof had problematic leaks due to structural and other faults. The Appellants were not completely aware of these leaks before taking transfer and only came to know the full extent of these defects after transfer. The Appellants contended that the Respondents were aware of the defects and fraudulently concealed them and thus sought to hold the Respondents liable.

[130] The sale agreement contained a voetstoots clause. Prior to the conclusion of the sale agreement, the Appellants were advised of certain rain damage to the roof, which had been repaired by the Respondent's contractor. The Respondents contended that following the repairs, they believed that the problems were addressed and consequently did not fraudulently withhold relevant information from the Appellants. The contractor had issued a verbal warranty in respect of his repairs but at the time of the sale of the property, this warranty had lapsed. The Respondents nonetheless assured the Appellants that the warranty was still valid, and this assurance was included in an addendum to the sale agreement.

[131] The court a quo found that because of the roof's serious structural defects, the damages claimed by the Appellants did not arise as a direct result of the Respondents' fraudulent conduct regarding the guarantee. The guarantee, despite being given by the Respondents to the Appellants, would not have averted the Appellants' loss as the guarantee related only to the contractor's corrective work and did not function as a guarantee in respect of all latent defects.

[132] On appeal, the Supreme Court of Appeal found that South African law holds a seller liable for all latent defects which render the thing sold unfit, or partially unfit, for the purpose for which it was envisioned. The Court went on to state that a leaking roof is a latent defect which renders the house unfit for habitation.

⁴⁶ 2013 (4) SA 77 (SCA).

[133] Consequently, as the Respondents had knowledge of one of the causes for the leaking roof, namely the deficient roof design; and notwithstanding the knowledge that it had not been permanently repaired, had concealed this, they were liable to the Appellants. The Respondents' conduct therefore vitiated the effect of the voetstoots clause. The court held that knowledge and fraudulent concealment of a latent defect vitiates the effect of a voetstoots clause. The appeal was accordingly upheld.

[134] An analysis of the evidence *in casu*, revealed that after the Plaintiffs were asked whether they still would have purchased the property if they knew about the defective decks, to which Mr Fitzpatrick responded that he probably would have, but with a condition of some kind of agreement with Mr Southern in resolving the deck issue.

[135] The Plaintiffs asserted that they suffered damages in the sum of R100 536.50, which comprises the costs incurred by the Plaintiffs in employing engineers to inspect and report on the upper and lower decks in the amount of R3 600. The cost incurred by the Plaintiffs in having plans drawn up and approved for the upper and lower deck replacement in the amount of R8 861.50. The cost incurred by the Plaintiffs in replacing the upper and lower decks is R88 075.

[136] The court was referred to the 3 quotations discovered from different deck contractors to indicate what the price for the replacement of decks amounted to. In this regard, Contour Decks, recommended replacement with full reasons; Choice Projects completed the replacement work and Master Decks recommended replacement with full reasons. Counsel for the Plaintiffs submitted that it is unreasonable to expect that evidence must be provided of the reasonable costs of repair, as it was explained in detail, being mindful of the fact that none of the decking contractors were willing to repair the decks. It was ultimately mooted that the Plaintiffs cannot be expected to repair the decks if they are unable to find a contractor willing to undertake such repairs.

[137] They argued that it ought to be deduced from Mr Beute and Mr Carelse's evidence that repair was not an option. Mr Fitzpatrick testified that none of the contractors were willing to repair the decks. Furthermore, Mr Beute and Mr Carelse testified that it would not have been possible or advisable to repair the decks, for various reasons which included *inter alia*:

- (a) Mr Carelse testified that the decks could not be repaired. This opinion was based on the age of the timber. He explained that it will need to be dismantled if you want to repair the decks. He stated that the timber was damaged to the extent that it was aged, decayed, deflected and bent. Furthermore, he explained that the decks were not maintained and that the timber no longer had the requisite density and quality that is needed. H2 timber was used while building standards require H3 or H4. In his view, it would have been impossible to use the existing timber. He further opined that the timber had to be replaced in order to meet the normative requirements. Mr Carelse testified that he did not think there is an engineer "out there" who would allow the decks' timber to be reused. It would not be fit for the purpose of carpentry or bulk construction. Mr Carelse expressed the following remark in his report dated 15 November 2022:

*"I am not surprised that the Fitzpatricks replaced the decks, rather than taking on the very expensive and difficult, if not impossible task, of trying to bring the decks into compliance with the legal requirements set out below."*⁴⁷

- (b) Mr Beute opined that a repair would have been possible but that it would have been a temporary remedy. In substantiation, he explained that because the timber was already bowed, it could not be straightened and therefore could not be reused. He also explained that it would not be possible to replace the wall supports with new supports because you have rotten members and if you have to replace it you have to take it out and by starting to take out members. It will dismember other members. Also, it would not have been wise to replace the bottom deck timber supports as you will again dismember all the joists. You cannot put scaffolding on the bottom deck to work on the top deck. He also would not have recommended repairing the decks taking into account that it was a 'jerry built' and because of the incident that the plaintiffs already

⁴⁷ Trial Bundle, Mr Carelse report page 370.

experienced. “It would have been an almost impossible task for any contractor to crawl under and remedy the deck, within the confined space below.”⁴⁸

[138] Dr Adendorff, as an architect and an expert witness, testified as to the reasonableness and necessity of the expenses relating to the replacement of the decks. He explained that the professional service and fees charged are fair and reasonable. He also testified that the construction costs of the replacement decks are on the high side of the deck per square meter rates, but within the acceptable construction rate range and therefore acceptable.

[139] The OTP contains a standard voetstoots clause warranting only that the seller was unaware of latent defects at sale. To defeat voetstoots, the Plaintiffs had to adduce prima facie proof that the seller knew of the latent defect at the time and deliberately failed to disclose it. For reasons articulated earlier in this judgment, they did not. To reiterate, both Plaintiffs accepted that Mr Southern was a decent man and a layperson. Their own experts accepted that the latent defects would not have been apparent to a layperson.

[140] The court having dealt with the “quick-fix” inferences, do not, without more, infer actual knowledge and deliberate concealment as per my earlier findings. Fraud will not lightly be inferred. For reasons already articulated, on the probabilities emerging at this stage, a prima facie case of dolus is absent.

[141] The *actio quanti minoris* requires proof of the amount by which the purchase price should be reduced. Plaintiffs relied on replacement costs (including upgrades and engineering choices) rather than the reasonable and necessary cost of repairing the defect to the plan-compliant standard. The *actio quanti minoris* requires a reasonable and necessary cost to cure to plan-compliant standard. On their own evidence, contractors recommended replacement. To my mind, replacement or upgrades are not the measure; the measure remains the reasonable cost to cure the defect, not to create a superior structure. There is no basis for the court to find that the Plaintiffs are entitled to a reduction in the purchase price of the

⁴⁸ Trial Bundle, Mr Beute report page 484.

property in the amount of R100 536.50. On the present record, quantification on the correct measure is not prima facie established. Consequently, for reasons previously articulated, absolution is warranted on Claim F.

Applicable provisions of the Consumer Protection Act (“CPA”)

[142] The alternative claims under which the Plaintiffs seek relief fall within the ambit of Section 41 which proscribes false, misleading or deceptive representations; Section 29 which prohibits misleading marketing; Section 4(5)(c) which addresses representations made without reasonable grounds; Section 48 which addresses unfairness; Section 52 which empowers remedial orders in proceedings concerning a supplier–consumer transaction; Section 61 which imposes strict liability for harm for unsafe/defective goods on producers/distributors/retailers and Section 113 which addresses joint and several liability of a principal for an agent/employee.

Ad Claim B: Against the First Defendant alternatively Third Defendant in terms of Section 61 of the CPA

[143] The Plaintiffs pleaded, under that alternative Claim B, that the First and/or Third Defendants’ misrepresentations amounted to the deceptive failure to disclose a material fact to the First and Second Plaintiffs as contemplated in Section 41(1)(b) of the CPA.

[144] Section 41 of the CPA dealing with false, misleading or deception representations, stipulates as follows:

- “(1) In relation to the marketing of any goods or services, the supplier must not, by words or conduct—*
- (a) directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer;*
 - (b) use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception; or*
 - (c) fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation, or permit or require any other person to do so on behalf of the supplier.”*

[145] The Plaintiffs further asserted that the First / Third Defendants’ misrepresentations amounted to marketing by a supplier as contemplated by the CPA in a manner which was:

- (a) Reasonably likely to imply a false or misleading misrepresentation concerning the property as contemplated in Section 29 (a) of the CPA; and/or
- (b) Misleading and/or fraudulent and/or deceptive in respect of the nature, properties, advantages and/or uses and/or as to a material aspect of the property as contemplated in Sections 29(b)(i) and/or (v) of the CPA.

[146] Section 29 of the CPA, in relevant parts dealing with general standards for marketing of goods or services, stipulates that:

“A producer, importer, distributor, retailer or service provider must not market any goods or services—

- (a) *in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services, as contemplated in section 41; or*
- (b) *in a manner that is misleading, fraudulent or deceptive in any way, including in respect of—*
 - (i) *the nature, properties, advantages or uses of the goods or services;*
 - (ii) *the manner in or conditions on which those goods or services may be supplied;*
 - (iii) *the price at which the goods may be supplied, or the existence of, or relationship of the price to, any previous price or competitor's price for comparable or similar goods or services;*
 - (iv) *the sponsoring of any event; or*
 - (v) *any other material aspect of the goods or services.*”

[147] Additionally, the Plaintiffs pleaded that the First / Third Defendant's misrepresentations amounted to the engagement in conduct that was unconscionable, misleading and/or deceptive and/or that was reasonably likely to mislead and/or deceive as contemplated in Section 4(5)(b) of the CPA. Moreover, the Plaintiffs pleaded that the First / Third Defendant's misrepresentations amounted to the making of representations about the property in circumstances where the First Defendant, alternatively Third Defendant, did not have reasonable grounds for believing that the representations were true, as contemplated in section 4(5)(c) of the CPA.

[148] The Plaintiffs asserted that the First Defendant, alternatively Third Defendant, was a supplier of estate agency services to the First and Second Plaintiffs and in conjunction with the supply of such services provided First and Second Plaintiff with access to the property. Accordingly, the First Defendant, alternatively Third Defendant is regarded as a supplier of the property to First and Second Defendant for the purposes of Section 61 of the CPA and seeks to hold the First Defendant alternatively the Third Defendant liable for the harm caused to the Plaintiffs due to the defects in the property contemplated in Section 61(1) of the CPA, read with Section 61(5)(c) and (d) of the CPA.

[149] The salient provisions of Section 61 stipulate:

‘61. Liability for damage caused by goods

(1) *Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence of—*

- (a) *supplying any unsafe goods;*
- (b) *a product failure, defect or hazard in any goods; or*
- (c) *inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods,*

irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

....

(5) *Harm for which a person may be held liable in terms of this section includes—*

- (a) *the death of, or injury to, any natural person;*
- (b) *an illness of any natural person;*
- (c) *any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and*
- (d) *any economic loss that results from harm contemplated in paragraph (a), (b) or (c).’*

[150] The matter of *Eskom Holdings Ltd v Halstead-Cleak*⁴⁹ (“*Halstead-Cleak*”) is instructive on the interpretation of the CPA, and restated the principles enunciated in the seminal judgment of *Natal Joint Municipal Pension Fund v*

⁴⁹ 2017 (1) SA 333 (SCA) (30 September 2016).

Endumeni Municipality (“*Endumeni*”)⁵⁰ in relation to the interpretive process, which involves ascertaining the intention of the legislature and considering the words used in the light of all relevant and admissible context, including the circumstances in which the legislation came into being. This entails, as per *Endumeni* “... ‘a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results. . .’”⁵¹ It is trite that Section 2(2) of the CPA enjoins a court to have regard to appropriate foreign and international law.⁵²

[151] The liability triggers in Section 61(1) are defined by Section 53(1) which stipulates as follows:

‘53. Definitions applicable to this Part

- (1) *In this Part, when used with respect to any goods, component of any goods, or services—*
 - (a) **“defect”** means—
 - (i) *any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or*
 - (ii) *any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances;*
 - (b) **“failure”** means the inability of the goods to perform in the intended manner or to the intended effect;
 - (c) **“hazard”** means a characteristic that—
 - (i) *has been identified as, or declared to be, a hazard in terms of any other law; or*
 - (ii) *presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised; and*
 - (d) **“unsafe”** means that, due to a characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons.’

⁵⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

⁵¹ At para 9.

⁵² “2. (1) *This Act must be interpreted in a manner that gives effect to the purposes set out in section 3. (2) When interpreting or applying this Act, a person, court or Tribunal or the Commission may consider—*

(a) *appropriate foreign and international law;*

(b) *appropriate international conventions, declarations or protocols relating to consumer protection...*”

[152] Section 1 of the CPA defines “**goods**” to include:

- ‘(a) anything marketed for human consumption;*
- (b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;*
- (c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product;*
- (d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of ‘service’ in this section; and*
- (e) gas, water and electricity;’*

[153] “**Service**” as defined in Section 1 of the CPA includes, but is not limited to:

- ‘(a) any work or undertaking performed by one person for the direct or indirect benefit of another;*
- (b) the provision of any education, information, advice or consultation, except advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act 37 of 2002);*
- (c) any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service—*
 - (i) constitutes advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act 37 of 2002); or*
 - (ii) is regulated in terms of the Long-term Insurance Act, 1998 (Act 52 of 1998), or the Short-term Insurance Act, 1998 (Act 53 of 1998);*
- (d) the transportation of an individual or any goods;*
- (e) the provision of—*
 - (i) any accommodation or sustenance;*
 - (ii) any entertainment or similar intangible product or access to any such entertainment or intangible product;*
 - (iii) access to any electronic communication infrastructure;*
 - (iv) access, or of a right of access, to an event or to any premises, activity or facility; or*
 - (v) access to or use of any premises or other property in terms of a rental;*
- (f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental; and*
- (g) rights of a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e),*

irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service;

[154] Counsel for the Plaintiffs extensively quoted from the dissertation written by Ilse Marlow (“Marlow”) under the supervision of Professor J Barnard, entitled *“The duties of an estate agent in the sale of residential property and the influence of the Consumer Protection Act”*. Marlow distilled the scope of the services of an estate agent.⁵³

[155] Marlow dissected the definition of “service” in the CPA as follows:

*“Part (a) of the definition of “service” provides a general, broad, inclusive, catch all definition of “service” to include any work or undertaking performed by one person for the direct or indirect benefit of another person...”*⁵⁴

[156] It would also be apposite to consider whether the First and/or Third Defendant was a “**supplier**” within the context of the CPA, which is defined as “a person who markets any goods or services”.

[157] The court was referred to the matter of *Doyle v Kileen and Others*⁵⁵ where the National Consumer Tribunal held that an estate agent and their agency qualify as a supplier under Section 1 of the CPA because an estate agent is a registered professional who markets goods (“property”) and services property to the public on the instruction of a seller, by the introduction of the parties in the ordinary course of business. In determining whether a transaction occurred within the ordinary course of business, the Tribunal pointed out that an ‘objective evaluation is needed’ in determining whether a person acted within the ordinary course of

⁵³ Ilse Marlow, “The duties of an estate agent in the sale of residential property and the influence of the Consumer Protection Act”. LLM dissertation October 2019 (University of Pretoria) Supervisor: Prof J Barnard at page 29: “...performs services in terms of an instruction or authority received from his client and accepted by him. An “estate agency service” is defined in regulation 1(d) of the Code of Conduct to mean any of the services referred to in section 1(a)(i) – (iv) of the definition of “estate agent” in the EAAA. In the context of the sale of residential property, estate agency services mean to “sell ... publicly exhibits for sale immovable property ... or negotiate in connection therewith or canvasses or undertakes or offers to canvass a ... purchaser therefor” or “... any such other service as the Minister on the recommendation of the board may specify from time to time by notice in the Gazette.”

⁵⁴ Marlow dissertation, pages 27 - 29.

⁵⁵ (NCT/12984/2014/75(1)(b) CPA) [2014] ZANCT 43 (25 September 2014) at page 66.

business. The court emphasised that the true nature of the contract is determined by the facts of the case rather than the labels used by the parties.

[158] The Plaintiffs argued that by virtue of an estate agent being classified as a supplier, the estate agent is legally obligated to comply with specific standards of conduct under the CPA, even if the underlying sale of the property is a private "once-off" transaction between a non-commercial seller and buyer. These obligations include those prescribed in terms of Sections 40 and 41 of the CPA relating to prohibition against unconscionable conduct in marketing or negotiations and prohibition against false, misleading, or deceptive representations regarding the property.

[159] It was argued that in applying the aforementioned principles and definitions enunciated in the CPA as clarified by the court in *Doyle*, the nature of the First Defendant's profession entailed that he markets property to the public, on the instruction of the seller, in this case, Mr Southern and as such, could be considered to be a "supplier" vis a vis the Plaintiffs and any other potential purchaser.

[160] The application of the CPA is encapsulated in Section 5. These provisions encompass all South African transactions involving the supply or promotion of products and services. Section 5(6) of the CPA is of relevance which states:

- '(6) For greater certainty, the following arrangements must be regarded as a transaction between a supplier and consumer, within the meaning of this Act—
 - (a) The supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collectivity, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity;'

[161] The SCA in *Halstead-Cleak* considered the definition of "ordinary course of business" as follows:

“‘Ordinary course of business’ is not defined in the Act but it has been the subject of interpretation in respect of, inter alia, insolvency matters. In Van Zyl & others NNO v Turner & another NNO⁵⁶ Brand J, when discussing whether a disposition was made in the ‘ordinary course of business’, found that the test is an objective one and that regard must be had to all the circumstances, including the actions of both parties to the transaction.”

[162] The specific provisions in Section 4 of the CPA state that:

“Realisation of consumer rights

(1) ...

(5) *In any dealings with a consumer in the ordinary course of business, a person must not—*

- (a) *engage in any conduct contrary to, or calculated to frustrate or defeat the purposes and policy of, this Act;*
- (b) *engage in any conduct that is unconscionable, misleading or deceptive, or that is reasonably likely to mislead or deceive; or*
- (c) *make any representation about a supplier or any goods or services, or a related matter, unless the person has reasonable grounds for believing that the representation is true...*

[163] In applying the definitions and Section 5 of the CPA to the facts, the Plaintiffs submitted that the First and/or Third Defendants are a party to the agreement of sale of the property. In this regard, Mr Latsky testified that he was acting in the ordinary course of his business while valuing the property for the Second Defendant and then, in terms of a verbal mandate, marketing the property to the Plaintiffs and selling it to them (in the limited sense). It was suggested that the agreement evidences the commission earned by the First and/or Third Defendant. In this regard, Mr Latsky testified that he earned 6% commission on the purchase price. The Plaintiffs contended that Mr Latsky supplied the following goods to the Plaintiffs:

- (a) information (e.g. that the property was potentially for sale, its location, information about the sellers, the property’s condition);
- (b) advice and information (that an immediate offer would allow them to “beat the crowds” as the property was not yet formally on the market), which falls within the ambit of “anything marketed for human consumption”, which in the light of the definition of “market” includes anything promoted or supplied);
- (c) photographs of the property;

⁵⁶ *Van Zyl & others NNO v Turner & another NNO* 1998 (2) SA 236 (C) para 34.

- (d) the agreement (OTP); and
- (e) the immovable property, in the limited sense of “selling” it to the Plaintiffs.

[164] The Plaintiffs also proposed that the following services were provided by Mr Latsky:

- (a) the viewing- access to the property / a right of occupancy of, or power or privilege over or in connection with any land or other immovable property other than in terms of a rental;
- (b) information (e.g. that the property was potentially for sale, its location, information about the sellers, the property’s condition);
- (c) advice and consultation with the Plaintiffs (e.g. that an immediate offer would allow them to “beat the crowds” as the property was not yet formally on the market and
- (d) other work such as arranging for the plaintiffs to visit the property again several times before transfer.

[165] Regard is also to be had to the definition of “**transaction**” which means:

- ‘(a) in respect of a person acting in the ordinary course of business—*
 - (i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or*
 - (ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or*
 - (iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or*
- (b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a);’*

[166] In considering the definition of transaction, the Counsel for the Plaintiff submitted that the First and/or Third Defendants:

- (a) acted in the course of their business, and entered into an agreement (the “Offer to Purchase” with the consumers in terms of which they supplied them goods (the sale of the property, in the limited sense of “selling”) for consideration, namely the commission which was paid to them indirectly via a third party, and

- (b) supplied the goods listed above to the Plaintiffs as their consumers in the ordinary course of business and for consideration. These goods were arguably supplied to the Plaintiffs at the direction of the Second defendant, and
- (c) supplied the services listed above to the Plaintiffs as their consumers in the ordinary course of business and for consideration.

[167] The Plaintiffs further contended that the interaction between the First and/or Third Defendants, and the Plaintiffs, consequently meet the requirements for a “transaction”. With reference to section 5 of the CPA, this transaction occurred in the Republic and is not exempted in terms of any of the sub-sections. Furthermore, the interaction was manifestly a promotion by the First and/or Third Defendants of the property, which is a “good” in the alternative, at the very least, amounts to a service. This promotion took place within the Republic and did turn out to result in a transaction. Counsel for the Plaintiffs contended that they successfully demonstrated that it is a transaction to which the CPA applies and the promotion of which is not exempted. The Plaintiffs contended that the CPA also applies to the defective property itself.

[168] I am satisfied that the CPA finds application. The CPA envisages “[t]o promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behaviour, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements”.

[169] Interpreted through the lens of its Preamble and stated objectives, the statutory overarching intent is undeniably the protection of the consumer. In terms of the provisions of Section 2(1), the CPA must be interpreted in a manner that gives effect to the purpose of the Act as set out in Section 3, which is to promote and advance the social and economic welfare of consumers, in particular vulnerable

consumers, in South Africa.⁵⁷ Section 2(9) of the CPA ensures that consumer rights in industry-specific legislation such as the EAAA are integrated with the CPA's broader protections.

[170] This means that after 2011, an agent's breach of the Code of Conduct, such as Clause 4 regarding misrepresentation, also constitutes a violation of the CPA's right to fair and honest dealing. It has concurrent applicability. However, the provisions that extend greater protection to a consumer must prevail.

[171] The Plaintiffs had to prima facie establish a misleading or deceptive representation as envisaged in Section 41; misleading marketing as envisaged in Section 29; unconscionable or deceptive conduct or lack of reasonable grounds as required in Section 4(5), or strict liability for harm due to a product defect in terms of Section 61. Section 61 imposes strict liability for "harm" caused wholly or partly as a consequence of unsafe/defective goods supplied by a producer, importer, distributor or retailer, as the case may be. To my mind, it is not a general misrepresentation remedy. Harm within the meaning of Section 61 is a defined concept going beyond ordinary patrimonial loss measured as repair costs. It must be tied to a qualifying "supply" of "goods" by a person within Section 61's supply chain. The Plaintiffs' own articulation recognises this constraint.

[172] I interpose to consider the argument that the First and Third Defendants are retailers because Mr Latsky supplied the "goods" to the Plaintiffs. This contention is predicated on the basis that Mr Latsky was a registered estate agent who marketed the property and facilitated access to and the initial viewing of the property. Section 1 of the CPA defines a "retailer" to mean a person who, in the ordinary course of business, supplies those goods to a consumer.

[173] To the extent that First/Third Defendant could by definition be considered a "retailer", regard is to be had to the meaning of "retailer" within the context of Section 61. Section 61's strict liability regime targets producers/suppliers of goods causing harm. In considering the conspectus of the evidence, the Plaintiffs

⁵⁷ Section 3 of the CPA.

did not establish that the agent, as opposed to the seller, “supplied” the immovable property within the ambit of Section 61 in a manner attracting strict liability for the latent deck defects; nor did they establish cognizable “harm” as opposed to patrimonial loss measured as repair costs.

[174] It must further be borne in mind that Section 61 (4) (b) - (c) pertinently states that *“liability of a particular person in terms of this section does not arise if the alleged unsafe product characteristic, failure, defect or hazard did not exist in the goods at the time it was supplied by that person to another person alleged to be liable; or it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person’s role in marketing the goods to consumers”*

[175] The evidence, taken at its highest, does not show the First and/or Third Defendants (agent/agency) as a producer, importer, distributor or retailer of the immovable in the sense contemplated by Section 61. Nor does it show an agent “supplying” the defective goods (the property) in a manner that locates the agent within the Section 61 chain.

[176] In addition, the pleaded loss incurred by the Plaintiffs is essentially the repair costs or patrimonial diminution flowing from latent defects. This is not the type of harm that Section 61 is designed to address under sub-paragraph 5, which stipulates:

- ‘(5) *Harm for which a person may be held liable in terms of this section includes—*
- (a) *the death of, or injury to, any natural person;*
- (b) *an illness of any natural person;*
- (c) *any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and*
- (d) *any economic loss that results from harm contemplated in paragraph (a), (b) or (c).’*

[177] Furthermore, Mr Latsky’s statements, on the Plaintiffs’ own evidence, amounted to aesthetic commendation or puffery for reasons earlier expounded on in this judgment. The referenced SCA authorities have treated general commendation as non-actionable puffery and reinforced the effect of voetstoots absent fraud or a

concrete assurance. While not a CPA case, *Odendaal*'s approach to non-specific praise vis-à-vis concrete assurance is apposite to assess whether Mr Latsky's words rise to a Section 41 representation. The property was presented as "renovated" and in pleasing condition, on the Plaintiffs' own version.

[178] The Plaintiffs' election to call Mr Latsky. They are bound by his evidence unless palpably false. His testimony that he made no structural assurances, asked the seller about defects, and was informed of none is not palpably false and is consistent with the objective context of his evidence. Under the then-applicable EAAA, the agent's legal duty was to disclose material facts within his personal knowledge and to avoid false statements. The Code of Conduct did not impose a duty to conduct technical or engineering investigations aimed at uncovering latent structural defects absent special circumstances.

[179] The Plaintiffs' forensic choice to call Mr Latsky as their witness has consequences. A party is generally bound by its own witness's evidence unless palpably false. His testimony spoke to aesthetics and, to my mind, did not promise structural soundness. He asked the seller about defects and had no knowledge of latent structural issues. This undermines the pleaded case and cannot be ignored at this stage.

[180] His explanation that he spoke to aesthetics and renovations stands. Mr Lasky provided no structural assurances. At best, the evidence supports marketing puffery and not a false or misleading representation about structural integrity. To my mind, the evidence, taken at its highest, shows aesthetic praise and a general statement that the property had been renovated; it does not show a structural assurance or omission amounting to deception, nor that the agent lacked reasonable grounds for his statement at the time.

[181] The matter of *Eskom Holdings Ltd v Halstead-Cleak*⁵⁸ ("*Halstead-Cleak*") is also instructive as the SCA determined that the strict liability provisions of the CPA apply only within the context of a consumer-supplier relationship or transaction. To my mind, the Plaintiffs have attempted to extend Section 61 beyond

⁵⁸ 2017 (1) SA 333 (SCA) (30 September 2016).

the text. I am of the view that there is no prima facie case made out under Section 61. Without a predicate breach, there is no platform for Section 52, as will be discussed later in this judgment. The Plaintiffs' reliance on Section 61 is therefore misplaced. The ancillary contraventions of Sections 29 (misleading marketing), 41(false, misleading or deceptive representations) and 4(5) (representations without reasonable grounds / misleading conduct) are also not made out at this stage.

[182] In light of “*Halstead-Cleak*”, even considering the evidence at its highest, I could not find for the Plaintiffs under Section 61. Even adopting the most generous approach to the Plaintiffs' evidence, it is manifest that the Plaintiffs have failed to meet the prima facie threshold to avert absolution. Consequently, absolution is warranted on Claim B.

Ad Claim C: As against the First Defendant alternatively Third Defendant in terms of Section 52 of the CPA

[183] The Plaintiffs asserted that the First/Third Defendants have contravened Section 41 and/or 48 of the CPA as contemplated in Section 52(1)(a)⁵⁹ thereof. In this regard, they averred that the misrepresentations resulting in the transaction pursuant to which the Plaintiffs purchased the property and became owners thereof, and/or the sale agreement, and/or the sale price were unjust and/or unreasonable and/or unfair as contemplated in Section 52(3)⁶⁰ of the CPA. The Plaintiffs also allege that, as a result, the First and/or Third Defendant contravened Section 41 and/or Section 48 of the CPA as contemplated in Section 52(1)(a) of the

⁵⁹ “(1) If, in any proceedings before a court concerning a transaction or agreement between a supplier and consumer, a person alleges that—

(a) the supplier contravened section 40, 41 or 48...”

⁶⁰ “(3) If the court determines that a transaction or agreement was, in whole or in part, unconscionable, unjust, unreasonable or unfair, the court may—

(a) make a declaration to that effect; and

(b) make any further order the court considers just and reasonable in the circumstances, including, but not limited to, an order—

(i) to restore money or property to the consumer;

(ii) to compensate the consumer for losses or expenses relating to—

(aa) the transaction or agreement; or

(bb) the proceedings of the court; and

(iii) requiring the supplier to cease any practice, or alter any practice, form or document, as required to avoid a repetition of the supplier's conduct.”

CPA with the result that the Plaintiffs seek a declaratory order in this regard. The Plaintiffs also seek compensation for the losses and/or expenses incurred and/or suffered by them as a result of the transaction and/or sale agreement and as a result of these court proceedings.

[184] Section 48 of the CPA, deals with unfair, unreasonable or unjust contract terms and states as follows:

- “(1) A supplier must not—*
 - (a) offer to supply, supply, or enter into an agreement to supply, any goods or services—*
 - (i) at a price that is unfair, unreasonable or unjust; or*
 - (ii) on terms that are unfair, unreasonable or unjust;*
 - (b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or*
 - (c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—*
 - (i) to waive any rights;*
 - (ii) assume any obligation; or*
 - (iii) waive any liability of the supplier,*
on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.
- (2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if—*
 - (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;*
 - (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;*
 - (c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or*
 - (d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49(1), and—*
 - (i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or*
 - (ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.”*

[185] Insofar as it pertains to the First and/or Third Defendants, Section 52 is remedial and operates “in any proceedings before a court concerning a transaction or agreement between a supplier and consumer”. It is premised on a contravention

of consumer-protection standards (for example, Sections 41 or 29). It presupposes a predicate contravention as envisaged in Sections 41 or Section 48 and then empowers a court to declare and mould relief. It does not create contraventions on its own. For reasons summarised under Claim B, the Plaintiffs have not shown a prima facie Section 41 breach (false/misleading representation) or Section 48 unfairness grounded in the terms or pricing proved in evidence.

[186] To reiterate, Mr Latsky provided no structural guarantees and spoke to aesthetics and renovations. These descriptors are not palpably false and bind the plaintiffs at this stage. In my view, there is no proper foundation made out by the Plaintiffs for Section 52 relief, given my finding that there is no prima facie proof of any predicate CPA contravention by the agent; his statements being aesthetic commendation (puffery) rather than misrepresentation, and that no deceptive omission or lack of reasonable grounds were established.

[187] Even if Section 52 were theoretically available, the Plaintiffs have not identified contract terms or pricing conduct that are, on the evidence, excessively one-sided or inequitable within the meaning of Section 48; nor is there proof that they relied upon a false or misleading representation contemplated in Section 48(2)(c) read with Section 41. The declaratory relief under Claim C is therefore unsupported at the prima facie threshold.

Ad Claim D: As against the First Defendant alternatively Third Defendant for failure to comply with its statutory obligations imposed on it in terms of the CPA

[188] The pleadings under claim D are an alternative claim to claims A, B and C where the obligations in terms of the CPA provisions, more particularly that of Section 41(1)(b); Section 29(a), 29(b)(i) and/or (v); Section 4(5)(b); and Section 4(5)(c) were focused.

[189] The evidential position in relation to these claims are by and large mirrored. I have extensively dealt with the applicable provisions of the EAAA and Code of Conduct, which required disclosure of known material facts and refraining

from false statements, but did not impose a forensic or engineering duty to detect latent structural defects.

[190] Mr Latsky's evidence, as a witness for the Plaintiff, is not shown to be palpably false, and there is no deceptive non-disclosure proven as discussed earlier in this judgment. The pleaded misrepresentation rests essentially on the agent's description of "stunning/beautiful condition" and an alleged assurance that no remedial work would be necessary. On the Plaintiffs' own evidence, the descriptor was aesthetic commendation linked to visible renovations; no explicit statement was made about structural integrity, plan compliance or the absence of latent defects. In ordinary commerce, such language is "puffery", not a verification of fact.

[191] Furthermore, there existed no obligation on Mr Latsky to conduct engineering-style latent-defect investigations absent special circumstances. To my mind, that evidentiary matrix undercuts a Section 4(5) or Section 41 case at the prima facie level. The Plaintiffs have thus failed to establish a prima facie breach of the cited CPA duties. Consequently, absolution is warranted in respect of claim D

Ad Claim G: As against the Second Defendant based on Section 113 of the CPA

[192] The Plaintiffs pursue this claim in the alternative to claims E and F. The Plaintiffs invoke Section 113 of the CPA to accord the seller (Second Defendant) with the agent's supposed CPA liability, jointly and severally. Section 113 is located within the CPA's enforcement machinery and states as follows:

'113. Vicarious liability

*(1) If an employee or agent of a person is liable **in terms of this Act** for anything done or omitted in the course of that person's employment or activities on behalf of their principal, the employer or principal is jointly and severally liable with that person.*

(2) This section does not apply in respect of criminal liability'(my emphasis)

[193] Section 113 imposes joint and several liability on the principal if the agent is liable "in terms of this act". Properly construed, it presupposes a proven contravention "*in terms of this Act*" by an employee or agent, acting within the course and scope of employment/agency, in a transaction to which the Act applies by virtue of Section 5. In other words, it makes Section 113 derivative of a proven CPA

contravention in a transaction to which the CPA applies by virtue of Section 5. It is derivative, meaning that it follows, but does not found, CPA liability.

[194] The test, simply construed, is that if no primary wrong exists, there can be no underlying wrong and consequently no vicarious liability can be attached. Accordingly, before Section 113 can attach joint liability to the seller *in casu*, the Plaintiffs must first establish, on a prima facie basis, that the agent contravened Section 41 and/or Section 29 (or other relevant provisions) in the course of CPA-regulated marketing conduct.

[195] This court has already found, for reasons earlier articulated, in this judgment that there is no prima facie contravention of Sections 29, 41 or 4(5) by the agent, Mr Latsky. The derivative mechanism in Section 113, therefore has no foothold. The evidence suggests that the seller, Mr Southern acted as a once-off private seller and not “in the ordinary course of business”. In my view, Section 113 cannot be read to collapse the Section 5 limitations or to turn a non-supplier transaction into a CPA one merely because a professional intermediary was used.

[196] Section 113 cannot operate without a predicate CPA breach. None has been shown. Consequently, absolution from the instance is warranted in respect of Claim G.

Ad Claim H: As against the Second Defendant based on Section 52 of the CPA

[197] The Plaintiffs asserted that the First/Third Defendant’s misrepresentations and/or Second Defendant’s non-disclosure and/or Second Defendant’s failure to correct First/Third Defendant’s misrepresentations and/or Second Defendant’s misrepresentations and/or Second Defendant’s misrepresentations, the transaction pursuant to which First and Second Plaintiffs purchased the property and became the owners thereof and/or the sale agreement was unjust and/or unreasonable and/or unfair as contemplated in Section 52(3) of

the CPA. As a consequence, the Second Defendant has contravened Section 41 and/or 48 of the CPA as contemplated in Section 52(1)(a), which stipulates:

'52. Powers of court to ensure fair and just conduct, terms and conditions

- (1) *If, in any proceedings before a court concerning a transaction or agreement between a supplier and consumer, a person alleges that—*
(a) *the supplier contravened section 40, 41 or 48...*'

[198] In the further alternative, the Plaintiffs seek a declaratory order against the First alternatively Third Defendant and/or Second Defendant, the one paying the other to be absolved on the basis of claim C, alternatively claim H in the following terms:

- (e) *declaring that having regard to First/Third Defendant's misrepresentations, the transaction pursuant to which First and Second Plaintiffs purchased the Property and became the owners thereof, and/or the sale agreement, and/or the sale price was unjust and/or unreasonable and/or unfair as contemplated in section 52(3) of the CPA, alternatively that having regard to First/Third Defendant's misrepresentations and/or Second Defendant's non-disclosures and/or Second Defendant's failure to correct First/Third Defendant's misrepresentations and/or Second Defendant's misrepresentations ... the transaction pursuant to which First and Second Plaintiffs purchased the Property and became the owners thereof and/or the sale agreement was unjust and/or unreasonable and/or unfair as contemplated in Section 52(3) of the CPA'*

[199] The order is sought because the CPA does not otherwise provide a remedy sufficient to correct the relevant injustice and/or unfairness arising from Second Defendant's misrepresentations as contemplated in Section 52(1)(b), which states that:

- (1) *If, in any proceedings before a court concerning a transaction or agreement between a supplier and consumer, a person alleges that—*
(a) *...; and*
(b) *this Act does not otherwise provide a remedy sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability, the court, after considering the principles, purposes and provisions of this Act, and the matters set out in subsection (2), may make an order contemplated in subsection (3).*

[200] This alternative claim is predicated on the basis that the Second Defendant has contravened Section 41 and/or 48 of the CPA, being the provisions to which reference is made in 52(1)(a), which was denied in its entirety. It is the Second Defendant's contention that the Plaintiff's reliance on Section 52 of the CPA is misplaced. In this regard, Section 52 expressly applies to "*a transaction or agreement between a supplier and consumer*". It was argued that Mr Southern was not a "supplier" as defined in section 1 of the CPA, and the sale agreement concluded by the Plaintiffs and Mr Southern is not a transaction as defined in the CPA.⁶¹

[201] It was argued that the Plaintiff's reliance on a "*transaction*" is also misplaced in that the sale agreement in respect of which the Plaintiffs purchased the property from Mr Southern:

- (a) Was not concluded by Mr Southern "*acting in the ordinary course of business*";
- (b) Was not concluded by the Plaintiffs as "*consumers*" and Mr Southern as "*supplier*" as defined in the CPA; and
- (c) Does not fall under the arrangements described in section 5(6) of the CPA.

[202] It was further contended that apart from the fact that there is no legal basis on which Mr Southern can be said to have contravened Section 41 of the CPA, there is also no evidence which has been led in support of the assertion that Mr Southern contravened Section 41 of the CPA. In augmentation hereof, Counsel for the Second Defendant submitted that Mr Southern as he was not a "supplier" as defined in section 1 of the CPA in that the property was not "*supplied*" by Mr

⁶¹ Section 5(6) of the CPA:

"(6) For greater certainty, the following arrangements must be regarded as a transaction between a supplier and consumer, within the meaning of this Act:

- (a) The supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collectively, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity;
- (b) a solicitation of offers to enter into a franchise agreement;
- (c) an offer by a potential franchisor to enter into a franchise agreement with a potential franchisee;
- (d) a franchise agreement or an agreement supplementary to a franchise agreement; and
- (e) the supply of any goods or services to a franchisee in terms of a franchise agreement."

Southern within the meaning of that term as defined in section 1 of the CPA, which requires that the supplier in an affected transaction must be acting “*in the ordinary course of business*” In support of this contention, reliance was placed on *Kondile v Nothnagel NO* (“*Kondile*”)⁶²

[203] In *Kondile*, the court held that the CPA does not apply to the sale of property by an executor of a deceased estate because such a sale does not occur in the “ordinary course of business.” The court clarified that for a transaction to fall under the CPA, the supplier must be engaged in the “continual marketing” of those specific goods, a requirement that an executor disposing of estate assets typically fails to meet. Because the CPA did not apply to the transaction in *Kondile*, the common law rules regarding the *voetstoots* clause remained in effect.

[204] It is trite that Section 48 of the CPA regulates unfair, unreasonable or unjust contract terms. It was submitted that Section 48 of the CPA is expressly applicable in respect of a “supplier”. Counsel for the Second Defendant contended that there is no basis on which Section 48 of the CPA can be relied on insofar as it concerns Mr Southern as he was not a “*supplier*” as defined in Section 1 of the CPA in that the property was not “*supplied*” by Mr Southern within the meaning of that term as defined in section 1 of the CPA, which requires that the supplier in an affected transaction must be acting “*in the ordinary course of business*”, as per the *Kondile* decision upon which reliance is placed.

[205] Section 52 operates in proceedings concerning a transaction or agreement between a supplier and a consumer. The distinction made in *Kondile* aligns with the general principle that the CPA is intended to regulate professional commercial transactions rather than once-off private sales. An individual selling their personal car or home is generally not acting in the “ordinary course of business” and may still place reliance on a *voetstoots* clause.

[206] Section 5 delineates the CPA’s field of application. In general, the Act applies to transactions where a person, acting in the ordinary course of business, supplies goods or services to a consumer for consideration. Once-off private sellers

⁶² (49891/2016) [2018] ZAGPPHC 858 (19 August 2018).

ordinarily fall outside the Act by reason of section 5(2)(b) which applies to any transaction in terms of which the consumer is a juristic person whose asset value or annual turnover at the time of the transaction equals or exceeds the threshold value determined by the Minister in terms of Section 6. Estate agents, however, market services in the ordinary course and their marketing conduct are capable of falling under Part F of the CPA, more particularly Sections 29 – 41 thereof.

[207] On a narrow and doctrinally coherent reading, Section 113 does not collapse the Section 5(2)(b) exclusion for once-off private sellers nor deem such sellers to be suppliers simply because they acted through a professional intermediary. To hold otherwise would render Section 5(2)(b) nugatory and expand the Act beyond its text and purpose.

[208] The court in *Richter NO and Others v Schatheuna Boerdery CC*⁶³ in reference to *Halstead-Cleak* reaffirmed that the court is to apply an objective test in determining whether a transaction took place in the seller's ordinary course of business.

*[60.] In **ESKOM Holdings Ltd v Halstead-Cleak** it was held that, having regard to the purpose of the **Consumer Protection Act**, only consumers as defined in the Act would enjoy its protection. With reference to the fact that "The definition of 'consumer' in s 1 is a person to whom goods or services are marketed in the ordinary course of a supplier's business, or who has entered into a transaction with a supplier in the ordinary course of a supplier's business", it was confirmed that for purposes of the Consumer Protection Act an objective test is to be applied in determining whether a transaction took place in the seller's ordinary course of business. The sale of an asset would not necessarily always be regarded as having been done in the ordinary course of a particular business'*

[209] On the facts before this court, Mr Southern was a once-off private seller who did not act in the ordinary course of business; as such, he does not fall within the CPA's definition of supplier by virtue of section 5(2)(b). Whilst the agent's marketing services may fall within the CPA. It is evident that section 52 cannot be used to grant relief against a non-supplier principal where the Act does not otherwise apply to that transaction.

⁶³ (CA&R19/2017) [2017] ZANCHC 60 (20 October 2017) at para 60.

[210] Even if Section 52 were theoretically reachable, the evidence does not prima facie establish that Mr Southern made false or misleading representations as contemplated in Section 41 of the CPA or imposed unfair terms or price in terms of Section 48. In this regard, the Plaintiffs have not identified contract terms or pricing conduct that are, on the evidence, excessively one-sided or inequitable within the meaning of Section 48.

[211] Moreover, for reasons articulated earlier in this judgment the Plaintiffs have not shown prima facie CPA contravention by the agent and that the seller was a private, once-off seller not acting “in the ordinary course of business”. It is clear that the seller was not a “supplier” for purposes of Sections 41 and 48. Even assuming arguendo that Section 113 could, in principle, visit a principal with an agent’s liability, an underlying contravention has not been made out on the evidence at this stage.

[212] Plaintiffs invoked the provisions of Section 113 to render the seller jointly and severally liable for the agent’s alleged CPA contraventions, and Section 52 to obtain just and equitable relief. The Plaintiffs has failed to establish prima facie that they are entitled to the relief which is being sought in the alternative for the restoration of the money to them as contemplated in Section 52(3)(b)(i) of the CPA in the sum of R100 536, 50.

[213] Absolution under claim H is therefore warranted which underscores the conclusion reached under claim G. The seller’s non-supplier status in this once-off sale and the absence of a predicate breach foreclose Section 52 relief. Considering the conclusion to which I have come, the declaratory relief under Claims C and H is also unsupported at the prima facie threshold.

Conclusion

[214] Absolution is granted sparingly, but in the interests of justice when the Plaintiff has failed to adduce evidence on an element essential to a cause of action. The question is whether there is evidence on which a court, applying its mind reasonably, could or might find for the Plaintiff, not whether it should. The Plaintiffs

presented an earnest case and obtained detailed expert inputs; however, the legal thresholds governing absolution are exacting. The court cannot fill evidential gaps by conjecture at this stage.

[215] There is a notable absence of evidence demonstrating that:

- (a) Mr Latsky made representations which were false;
- (b) Mr Latsky made representations which were wrongful;
- (c) Representations were made by Mr Latsky negligently;
- (d) Mr Southern was aware of the latent defects and that
- (e) Mr Southern deliberately concealed the defects with the intention to defraud.

[216] For transactions occurring after 1 February 2022, the EAAB Code of Conduct has been superseded by the regulations and mandatory disclosure requirements set out in the PPA. The perceived differences in the wording of the Code of Conduct often arise from the transition between the EAAA and the PPA, as well as the overlay of the CPA. While the core ethical duties of honesty and disclosure remain consistent, the modern framework under the PPA and CPA has shifted from a purely ethical "code" to a more rigorous statutory "legal duty" with specific mandatory disclosure requirements.

[217] However, the consumer-focused principles found in Sections 67(1) and (2) of the PPA largely codify and reinforce existing duties that were already present in 2013 under the EAAA Code of Conduct. Whilst it is evident that the Code of Conduct has evolved, this court is mindful that for matters originating in 2013, the EAAA remains the governing standard for determining the agent's legal duty of disclosure. The scope of an estate agent's duty is limited to material facts within the agent's knowledge. The PPA cannot be used to retroactively impose a legal duty on an estate agent for a sale concluded in 2013, as the PPA only came into operation on 1 February 2022. While Section 67 of the PPA is not the governing statute for a 2013 sale, its requirements regarding mandatory disclosure forms reflect the evolution of the "legal duty" that existed under the previous regime.

[218] Puffery is part of ordinary property marketing. Without a specific assertion of structural integrity or regulatory compliance, or proof of deceptive

silence in the face of a known material risk, Section 41 and/or Section 29 are not triggered. To reiterate, the Mr Latsky's conduct sits within aesthetic commendation.

[219] On the common law, the fraud exception to voetstoots is narrow and exacting. The experts' concession that a layperson would not detect these defects strongly undermines any inference of actual knowledge and deliberate concealment by the seller.

[220] Even if contractors preferred replacement, the *actio quanti minoris* remains tied to the reasonable cost to cure to the plan-compliant baseline. Upgrades and superior specifications cannot be passed on to the Defendants as a matter of legal principle.

[221] It is evident that Section 113's derivative nature preserves the CPA's architecture in that it ensures principals do not escape where an agent contravenes the provisions of the CPA. However, Section 113 cannot be construed to transform non-suppliers into suppliers. The Plaintiffs' reading would, effectively, erase Section 5(2)(b) as once-off private sellers ordinarily fall outside the CPA.

[222] For multiple Defendants, the court remains mindful that it may not yet have all the evidence, but the Plaintiff must still establish a prima facie case on every element of at least one cause. In *Putter v Provincial Insurance Co Ltd and Another*⁶⁴, the court addressed the unique evidentiary challenges faced by a Plaintiff who sues multiple defendants. In this regard the court held:

'When there is more than one defendant each of whose evidence could be inimical to the other and from the plaintiff, who cited them, cannot expect co-operation and that, therefore, the court cannot assume that it has heard all the evidence material to a just decision.'

[223] This court is alive to the established principle that where a Plaintiff has joined multiple defendants whose versions of events are likely to be hostile to one another, the threshold for surviving an application for absolution is lowered.

⁶⁴ 1963 (3) SA 145 (W)

However, the matter *in casu* must be adjudicated on its own unique facts. In this regard, the First Defendant's evidence has already been placed before this court. Mr Southern is deceased and Mrs Southern's medical condition is such that she will not be in a position to testify. The death knell to the Plaintiffs' case is their election to call the First Defendant. In keeping with the general rule that a party is bound by evidence so adduced unless palpably false, this court could not find that the evidence of Mr Latsky was palpably false. In my view, the evidence of Mr Latsky did not cure any deficiencies in the Plaintiffs' pleaded case.

[224] It is also noteworthy that Mr Fitzpatrick unequivocally testified that "to attack the Southern's was a wrong thing to do" as the Southern's were guided by estate agents. He further stated that it would be wrong to attack Mr Southern as he did not know about his responsibilities as a seller of immovable property. During cross-examination, Mr Fitzpatrick stated that Mr Southern was not responsible. He expressly articulated that Mr Southern's integrity was not in question and that he considered him to be an honest man. This is affirmed by a letter which Mr Fitzpatrick addressed to the Estate Agency Affairs Board wherein he wrote:

'Both the Southern's, from whom we bought the house and ourselves treated with each other and with Mr. Latsky openly and in good faith.

...The Southern's are decent honest people and they did not realize their responsibilities under these circumstances. They were at pains to point out anything they felt was defect. They did not think of the decks and neither did we."

[225] Mr Fitzpatrick's evidence therefore demonstrates that Plaintiffs pursuit in respect of the Second Defendant appears to be guided by advises given to them by their legal representatives and is further borne out by the apparent reluctance of Mr Fitzpatrick to directly accord any intentional wrongdoing to the sellers. Mr Fitzpatrick testified that his legal representative informed him that he had to sue both Mr Southern and Mr Latsky and that he could not sue the one without suing the other. Mr Fitzpatrick clearly articulated his intention during cross-examination to teach Mr Latsky a lesson and to establish a precedent in respect of estate agents.

[226] Therefore, even adopting the most generous approach to the Plaintiffs' case at the close of their evidence, it is my view that there is no evidence upon which a court, applying its mind reasonably, could or might find for them on the essential

elements of any of the claims. Consequently, absolution from the instance, with costs as set out, must follow.

Costs

[227] It was submitted by the Plaintiffs that they had to approach the High Court in this matter as there is no precedent yet regarding the applicability of the Consumer Protection Act on an estate agent in terms of a sale agreement. The First Plaintiff explained in detail why they deem it necessary to have the court set a precedent, especially with reference to the First and/or Third Defendants' actions (misrepresentations) in this matter. It was submitted that the Plaintiffs had no alternative than to persist with their claim against the Second Defendant as Mr Southern was the seller of the property.

[228] Counsel on behalf of the Second Defendant submitted that Second Defendant is entitled to costs on Scale B including the costs occasioned by the postponement of the trial on 27 August 2024, on account of the following:

- (a) The quantum of the Plaintiffs' claim against the Defendants falls within the monetary jurisdiction of the Magistrate's Court.
- (b) Both Mr and Mrs Fitzpatrick confirmed that in terms of clause 20 of the sale agreement, the parties consented to the jurisdiction of the Magistrate's Court in respect of any action arising out of the sale agreement. Having regard to the value of the claim the Plaintiffs confirmed that there was nothing preventing them from instituting the claim against the Second Defendant in the Magistrate's Court. The letter of demand dated 16 September 2014, which was sent to Mr Southern, stated that in the event of non-payment the Plaintiffs would claim damages in the Magistrate's Court. There is no reason to have instituted these proceedings in the High Court.
- (c) The Plaintiff's urgent application to compel delivery of trial particulars caused the incurrence of unnecessary legal costs and caused a delay in the finalisation of the trial proceedings. The Plaintiffs were unsuccessful in respect of that application with the result that the Second Defendant has incurred costs unnecessarily. These costs could have been avoided if the Plaintiffs had

utilised the pre-trial procedure to deliver a request for trial particulars from the Defendants prior to the commencement of trial which they failed to do.

- (d) The matter was declared trial-ready in respect of both the merits and quantum. However, the Plaintiffs failed to deliver their expert notices and reports on quantum in accordance with Rule 36(9)(a) and (b), which was the primary reason for the postponement of the trial on 27 August 2024.
- (e) The Second Defendant has been put through the expense of a trial merely because on the Plaintiffs' version, they sought to establish a precedent against the First and/or Third Defendants.
- (f) The Plaintiffs persisted with a claim against the Second Defendant despite the knowledge as at 29 August 2022 that the value of the assets in the Second Defendant's estate, as reflected in the inventory filed with the Master of the High Court, was R147 800 which was made up of R50 000 being the value of his personal belongings and R97 800 being the value of the Renault Clio vehicle.

[229] It was contended that the Second Defendant was unjustly compelled to defend these proceedings and should be indemnified for the costs incurred as a result. This court is mindful that there was apparent uncertainty regarding the aspect of separation of merits and quantum which was only clarified on the morning of 27 August 2024. The matter could not proceed because the Plaintiffs needed to file their expert notices and reports in respect of the quantum. The First Defendant was also unable to attend court for medical reasons and expressed his wish to be present while the Plaintiffs testified. The parties were only informed of this fact on 26 August 2024.

[230] The purpose of an award of costs to a successful litigant is to indemnify him for the expense to which he has been put through having been unjustly compelled to initiate or defend litigation, as the case may be.⁶⁵ It is trite that costs ordinarily follow the result. I find no reason to depart from the accepted legal principle. Consequently, in the exercise of my discretion, I order that Counsel's fees

⁶⁵ *Price Waterhouse Meyernel v The Thoroughbred Breeders' Association of South Africa* 2003 (3) SA 54 (SCA) at para 18.

be taxed on a Scale B given the clearly identified features of this case that were sufficiently complex, important and valuable to the respective parties.

[231] Although the quantum of the claim falls within the jurisdiction of the Magistrate's Court and the OTP recorded consent to that forum, the Plaintiffs raised novel CPA questions, involving multiple causes of action and expert evidence. The trial was heard over several days. In these circumstances, I am of the view that the High Court forum is justified. It therefore follows that the successful Defendants are entitled to their costs on Scale B. In the exercise of my discretion, I deem it appropriate that the costs occasioned by the postponement of 27 August 2024 be costs in the cause.

Order

[232] In the result, I grant the following orders:

1. Absolution from the instance is granted in favour of the First, Second and Third Defendants in respect of all claims.
2. The Plaintiffs are ordered, jointly and severally, to pay the Defendants' costs of suit, including the costs of the application for absolution on Scale B.
3. The costs occasioned by the postponement of 27 August 2024 are ordered to be costs in the cause.

ANDREWS AJ

**Acting Judge of the High Court of
South Africa, Western Cape Division,
Cape Town**

Legal Representatives

Plaintiff's Counsel: Adv. Elaine Auret

Instructed by: Trudie Broekman Attorneys

Defendant's 1st & 3rd Counsel: Attorney Mr. Michael Wagener

Instructed by: Michael Wagener Attorney

Defendant 2nd Counsel: Adv. Ria Matsala

Instructed by: Ad Astra Law (prev. TSP Attorneys)