
SOUTH AFRICA / JUDGMENT

Ismail NO and Another v Erf 87 Dullstroom CC (A357/2015) [2015] ZAGPPHC 835 (11 December 2015) [2015] ZAGPPHC 835

COURT

North Gauteng High Court, Pretoria

BEFORE

M.G Phatudi, M. Jansen

CASE / FILE NUMBER

A357/2015

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Appeal Case No: A 357/2015

DATE: 11/12/2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

BHAMJEE ISMAIL N.O FIRST

APPELLANT

BHAMJEE ABOOBAKER N.O SECOND

APPELLANT

and

ERF 87 DULLSTROOM CC RESPONDENT

JUDGMENT:**APPEAL****PHATUDI AJ:**

[1]

INTRODUCTION:

1.1 This is an appeal against the whole of the judgment of the Magistrate Mr. V.B Cooke, sitting as Court of first instance in the Belfast Magistrates Court. The Judgment appealed against was delivered on 5 January 2015.

The facts giving rise to the present appeal are briefly the following:-

1.2 The appellants, (plaintiffs in the Court a quo) of Erf 87 Dullstroom CC (“the property”), instituted an action against the respondent (defendant in the court a quo) in which they claimed a reduction of the purchase price in the sum of R85 000-00 being the difference between the original contract price and the price that the appellants would have been willing to pay for the merx, if they had been aware of a road reserve or servitude attached to the property. The action, therefore, is one based on the common law.

The actio quanti minoris.

1.3 The Deed of Sale entered into between the parties described the property purchased as measuring 1322 square metres (1 322 m2) in size and extent. However, it appears from the evidence that the property is subject to an unregistered road reserve measuring 397m2 in extent. [1] The respondent could therefore not utilize the 397m2 of the property forming part of the road reserve.

1.4 Clause 6 of the Deed of Sale contained a “voetstoots” provision. It provides as follows:-

Clause 6.1:

“Save as provided herein, the Property is sold “voetstoots” and as described in the existing title Deed or Deeds thereof, and shall subject to all conditions and servitudes (if any) attaching thereto or mentioned or referred to in the Title Deed under which the property is presently held or any prior Tittle Deed. The seller shall not be liable for any re-survey, nor shall the seller benefit by any surplus in extent.”

1.5 It was this “voetstoots” clause that triggered the dispute between the parties during the trial in the court below.

1.6 In rendering its judgment, the court below made pertinent findings which include, inter alia, that:-

1.6.1 The appellants were fully aware of the existence of the road reserve on the property.

1.6.2 The said road reserve constituted a latent defect.

1.6.3 The appellants were entrusted with a duty to advise the respondent of the presence of the servitude, but failed to do so.

1.6.4 Such failure to disclose amounted to a fraudulent concealment of the truth, made with the intent to induce the respondent into entering into the deed of sale in respect of the property.

1.7 Aggrieved by the findings in the judgment of the court of first instance, the appellants now approached this court for relief.

1.8 It was contended on behalf of the appellants that the court a quo erred in disregarding the provisions of the “voetstoots” clause in the purchase agreement.

I do not subscribe to this submission.

It is trite that a seller, in casu, the appellants cannot invoke and find refuge in the protection accorded by a “voetstoots” clause where the purchaser (the respondent) can establish that the seller was in fact aware of a latent defect in the property sold either before or when the contract was entered into.

The same could be said where the seller intentionally concealed the presence of the defect *dolo malo*. In short, these are the exceptions available to negate a “voetstoots” clause in a contract.

1.9 In the present case, the learned magistrate found, correctly so, that the appellants were aware of the defect in the size of the property sold occasioned by the road reserve.^[2] This assertion is fortified by the fact that by June 2001, the appellants had already instructed one Mr. R. Van Heerden, a professional land surveyor, to prepare sub-division diagrams in respect of the property. A discussion between Mr. Van Heerden and the first appellant revolved around the road reserve passing over the property. It follows logically that given the date upon which the contract was signed, namely 01 November 2001, that the first defendant (“first appellant”) was already aware of the defect some five (5) months before conclusion of the contract. This fact, it appears, was not disputed by the appellants’ attorney.

[2] This then brings us to another inquiry namely, what constitutes a latent defect within the law of contracts. The concept was aptly summed up by Corbett JA in *Holmdene Brickworks (Pty) Ltd v Roberts Construction 60. Ltd.*,^[3] wherein the learned judge stated:-

“Broadly speaking, in this context, a defect may be described as an abnormal quality or attribute which destroys or substantially impairs the utility (and the court emphasises this) which substantially impairs the effectiveness of the res vendita for the purpose for which it has been sold or for which it is commonly used.”

“Such a defect is latent when it is one which is not visible or discoverable upon an inspection of the res vendita.”

[3] It is common cause that the respondent purchased Erf 87 in order fully to utilize the 1 322m² and had plans drawn up by an architect for such full utilization, namely for the purpose for which it has been sold or for which it is commonly used.

- [4] The fact that the respondents were compelled to re-draw the initial plans to obviate the 397 m2 short fall of the 1 322 m2, because of the road reserve, can only be indicative of the fact that no building could be permitted to be erected on the road reserve. In the premises, it follows that the defect occasioned by the road reserve constitutes a latent defect in the property sold of which the appellants were aware and failed to disclose to the respondents.
- [5] In order to qualify as a latent defect, it must have been one which is not “visible or discoverable upon an inspection of the res vendita”.
- [6] This was also the dictum in *Glaston House (Pty) Ltd v Inag (PTY) Ltd*, [4] where the court stated:

“It precluded the redevelopment for which the property had been bought.

It thus constituted a latent defect in the quotation.”

- [7] The conclusion arrived at by the court a quo that there existed a latent defect in the merx cannot be faulted. The Court’s finding is apparent from the record of 13.05.2013 which states:

“He was accordingly aware (Mr I Bamjee) of the road reserve in June 2001, although not aware of the extent of the road reserve, but merely its existence”[5] (my underlining)

- [8] Furthermore, Mr Bamjee, (first appellant) was fully aware of the road reserve when he conceded:-

“I was aware of it, but I never spoke to him about it.”

- [9] The reliance placed on the “voetstoots” clause in the contract by the appellants as a defence in resisting liability, is of no avail. This approach was also adopted by the appellate division in the case of *Van der Merwe v Meades*[6] where it was held:

“A Seller would be deprived of the protection afforded by a “voetstoots” clause where the purchaser can prove that the seller:-

- (1) Was aware of the defect in the merx at the time of the making of the contract, and
- (2) dolo malo concealed its existence from the purchaser with the purpose of defrauding him.”

I find myself entirely in agreement with the foregoing principle which I am bound to follow in the present case.

- [10] In the circumstances, and apart from the visibility or otherwise of the defect, I agree with the appellants’ submission, which has considerable force, that it would still have been legally impossible for them to have extended developments to the road reserve, the impediment being caused by the provisions of sections 1 and 34(a) of the Roads Ordinance. [7] This impediment which flows ex lege the ordinance, invariably compelled the appellants to reduce the size of the planned structure of the shopping centre and the number of parking bays. This, needless to say, caused the respondent not only undue hardship, but also

prejudice of a serious pecuniary nature. The road reserve thus constituted an “abnormal quality” which impaired the utility of the property referred to by Corbett JA in Holmdene Brickworks (Pty) Ltd.’s case supra.

[11]

LEGAL FRAMEWORK:

11.1 It is generally accepted in our law that a party who has been induced to enter into a contract by the misrepresentation of an existing fact, is entitled to rescind the contract provided that the misrepresentation was material and was intended to induce him to enter into the contract, and did so induce him.[8] Where the misrepresentation was fraudulent or negligent, the innocent party is correspondingly entitled to damages.

11.2 It is also trite that in contracts of sale there is a duty on the seller to disclose latent defects of which he is aware, the extent of the duty having been settled by the Appellate Division in the Meades case, supra.

In the matter of Truman v Leornard[9] a similar approach was adopted.

11.3 In my view, therefore, in some contracts parties are held to a greater duty of disclosure but the determination of the extent of the disclosure does not depend on the label with which the contract is branded. Where one party has knowledge not accessible to the other party, and where from the nature of the contract the latter (as in the present instance) binds himself verbally or otherwise on the basis of the information communicated (the respondent in this case), the non-disclosure of any such fact is fatal. The contract is voidable at the instance of the aggrieved party because the risk run is in fact greater or different from the risk understood and intended to accept at the time of the agreement.

[12] On a conspectus of the evidence in the present matter, it admits of no doubt that the materiality of the misrepresentation, be it whether it was fraudulent or negligent, goes to the root of the contract. Put differently, it is generally required that the misrepresentation made, objectively viewed, would have persuaded a reasonable man, acting cautiously, to enter into a contract as a whole, or if he did, on different terms and conditions. In casu, the court is satisfied that the misrepresentation was conveyed intentionally and caused the respondent to act to its detriment.

[13] The foregoing requirement was introduced to our legal system by De Villiers CJ as early as back in 1909 in Woodstock, Claremont, Mowbray and Rondebosch Councils v Smith,[10] wherein the learned Chief Justice stated that to justify in the rescission of a contract, a misrepresentation must be made:-

“With the object of inducing (the other party) to enter the contract or with the object of concealing from him facts the knowledge of which would be calculated to induce him to refrain from entering into the contract”.

[14] In the circumstances, the appeal falls to be dismissed for want of merit. In consequence, I propose the following order:

COURT ORDER

1. The appeal is dismissed.
2. The appellants are ordered to pay the costs including the costs of counsel.

M.G PHATUDI

ACTING JUDGE OF THE HIGH

COURT, PRETORIA

I agree and it is so ordered.

M.JANSEN

JUDGE OF THE HIGH COURT,

PRETORIA

REPRESENTATIONS:

Counsel for the Appellants: Adv. L.K. Van der Merwe

Instructed by: Ian Richard Bailie Attorneys

Counsel for Respondent: Adv. J.G Botha

Instructed by: Peter Mottee Attorneys

Arcadia, Pretoria

Date heard: 03 November 2015

Date delivered: 11 December 2015

[1]. Annexure "A", Pp 9,P 47, line 10, and sketch plan, P444 (vol 6, annex "C".

[1]. Annexure "A", Pp 9,P 47, line 10, and sketch plan,
P444 (vol 6, annex "C".

[2]. P 478, Vol 7, Record

[3]. 1977(3)SA 670 [AD] at p.683(h) to 684(a)

[4]. 1977(2) 846 [AD] at 866 (f)

[5]. P 483, lines 10-20, Vol 7, Record

[6]. 1991 (2) SA 1 (AD) at 8 B-E

[7]. Ordinance 22 of 1957

[8]. See p271 “The law of contract in South Africa” 5th Ed.by R.H.Christie

[9]. 1994 (4) SA 371(SE)

[10].

(1909) 26 sc 701(“supra court”)

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