

SOUTH AFRICA / JUDGMENT

Van Rooyen v Brown and Another (A3104/2015) [2018] ZAGPJHC 453 (28 June 2018) [2018] ZAGPJHC 453

COURT

South Gauteng High Court, Johannesburg

BEFORE

H Cele, M Twala

CASE / FILE NUMBER

A3104/2015

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

APPEAL

CASE NO.: A3104/2015

CASE

NO. A QUO: 48763/2012

REPORTABLE:

YES

/ NO

OF

INTEREST TO OTHER JUDGES: YES/NO

In

the matter between:-

VAN

ROOYEN,

EMMERENTIA

APPELLANT

(DEFENDANT

–COURT A QUO)

AND

BROWN,

DAMON

JAY

FIRST RESPONDENT

(FIRST PLAINTIFF
–COURT A QUO)
BROWN,
JENNA CATHLEEN
SECOND RESPONDENT
(SECOND
PLAINTIFF- COURT A QUO)

JUDGMENT

Heard: 05 June 2018

Delivered: 28 June 2018

CELE AJ (TWALA J concurring)

Introduction

[1] In these proceedings, the Appellant seeks an order to set aside the whole of the judgment of Magistrate H.A. Twele sitting in Randburg Magistrate's Court granted in favour of the Respondents on 11 September 2015. She awarded the Respondents R92 352 80 as damages for physical defects to a residential property they purchased from the Appellant. The Respondents oppose the appeal. The Appellant also seeks to be granted condonation for the late filing of the record of the appeal but this application is not opposed by any of the Respondents.

Factual

Background

[2] Sometime towards the end of 2010 or at the beginning of 2011 the Appellant put her house on sale for R3 600 095 .00

utilising the services of Kings Estate Agents and Auctioneers ("the agent") to market and sell the property. The Respondents were introduced to and shown the property by the agent. The first offer they put was rejected. This house was also put on auction but no buyer put up any acceptable offer. When the selling price was finally dropped to R2 300 00.00, the Respondents presented an acceptable offer to purchase in July 2011. The agreement was that the Respondents would move into the property once transfer into their names had been effected. However, by agreement the Appellant moved out in December 2011 relocating to Cape Town and the Respondents moved in, also in December 2011, paying occupational rent. The property was transferred to their names in January 2012.

- [3] Prior to signing the final sale agreement the Respondents inspected the property. It remained unclear whether they visited the house once, signed and then visited it again on two or three occasions or that there were two or three occasions of their visit before they signed. All such visits were only in the presence of the agent. In one of such visits, the second Respondent invited her father, who was a builder, to come and help inspect this house.
- [4] The Sale Agreement specifically made provision for a warranty, voetstoots sale condition, electrical certificate of compliance and a non-variation clause. In particular, clause 10 of the contract of sale catered for the warranty in respect of fixtures and fittings, including the pool filter and automatic pool cleaner. Clause 13 stated that the seller will, at her expense, obtain and provide an Electrical Compliance Certificate in respect of the wiring and electrical installations on the property to the purchaser and will also be liable for the costs of any work and materials required for the issue of the certificate, prior to registration of transfer.
- [5] After the Respondents had taken occupation of the property they discovered a number of defects to the property which they contend had not been apparent at the time of viewing the property and which were not pointed out to them by either the Appellant or the agent and/or were deliberately withheld from the Respondents by the Appellant and/or her agent. They also contend that they discovered that the property was not electrically compliant and that the Electrical Compliance Certificate presented to them by the Appellant, was invalid. Further, they contend that they discovered, upon taking occupation, that certain fixtures and fittings, which the Appellant warranted to be in good working order and condition, were not in good working order and condition as warranted. As a result of the said defects and breach of warranty, the Respondents claimed damages from the Appellant. They identified the following as defects:
- 1 A leaking roof in the office bathroom;
 - 2 Leaking Thatch Carport Roof;
 - 3 Kitchen windows being installed incorrectly;
 - 4 Broken mirrors on the cupboard doors;
 - 5 Defective Electric Fence;
 - 6 Defective Pool Pump and Filters;
 - 7 Missing Front Door Keys;
 - 8 Invalid electronic compliance certificate;
 - 9 Lick in the office and spare room walls.

[6] The pleaded case of the Respondents can be summarised as follows: -

Claim 1:

- 1 The Appellant had a tacitly agreed or an implied duty to disclose all defects whether latent or patent, as well as all other relevant facts;
- 2 The defects were deliberately, negligently or without fault withheld from the Respondents by the Appellant and/or her agent;
- 3 The aforesaid non-disclosure induced the Respondents into entering into the Sale Agreement;
- 4 The defects were latent and invisible to the Respondents;
- 5 The defects either diminish or destroy the use of the property for what it was sold or commonly used;
- 6 The Appellant acted dolo malo with the intention of defrauding the Respondents;
- 7 The Respondents sought damages, alternatively a quanti minoris.

Claim 2:

- 8 The Appellant breached the warranty in respect of the pool pump and filters;
- 9 The Appellant failed to provide a valid certificate of compliance.

[7] On the other hand, the Appellant raised the following in defense to the claim: -

- 1 The property was sold “voetstoots”;
- 2 The pool pump and filters were in normal working order at the time the property was sold;
- 3 A valid certificate of compliance was provided, in terms of which transfer took place.

Evidence led at trial

- [8] At the commencement of the trial, the Appellant disputed every fact pertaining to defects pleaded by the Respondents. However when trial proceeded, not much challenge was made on the evidence tendered by witnesses called by the Respondents as experts. In a nutshell, the evidence led on disputed issues was that the Electrical Compliance Certificate provided by the Appellant to Respondents was invalid and the Respondents suffered damages as a result thereof when the electrician engaged by the Appellant failed to correct the defects. The Respondents had to employ the services of another electrician to correct various defects in order for such electrician to provide a valid Electrical Compliance Certificate.
- [9] Clause 10 has the warranty in respect of fixtures and fittings which included the burglar alarm and panic buttons. Upon collecting the keys of the property the Appellant showed the Respondents the energizer for the electric fence in the garage. The Appellant advised the Respondents not to touch the board as it had shocked her gardener a few times. They engaged the services of a security company which upon inspection advised them that the whole energizer needed to be replaced. Mr. Holt, being the expert in respect of the electrical fence inspected the fence on 14 December 2011 and found that the energizer was damaged beyond economical repair. There were no earth spikes on the fence from the entrance gate

to the end of the fence. In the absence of earth spikes, the alarm could not activate. The fence required general maintenance such as bobbins, hooks, springs, ferrels and the fence needed to be re-tensioned. Only an expert was able to determine the issue with the fence. In this regard, the Appellant testified that a loose wire shocked the gardener but she did not tell this to the agent. As the lights were flickering and the fence had a ticking sound, she assumed it was working properly.

- [10] The warranty in respect of fixtures and fittings in clause 10 included the pool filter and the automatic pool cleaner. The Second Respondent testified that after taking occupation it came to her attention that the pool pump and the filter were not working as they should have and eventually stopped working. An expert was called in, being Mr. Cullen who inspected the pool on 2 January 2012 and found, amongst others, that the entire pool filter and pump had to be replaced as both were not in working order. He opined that the pool had been maintained through the use of chlorine to keep water looking clean. The damage to the pool pump was due to wear and tear and years of being used and had to be replaced. The Appellant testified that the pool pump and the filter were in working condition at the time of the sale.
- [11] In respect of the house keys, the Appellant admitted that at all times she knew that there were no keys for the front door. She would not normally use that door to exit the house. She would lock the door from inside and then use a different exit door when leaving the house. She merely forgot to mention this to the agent or the Respondents.
- [12] In respect of the cracked mirror panes the Respondents' testimony was that upon taking occupation of the property, they

noticed that two of three mirrored panes on a mirrored cupboard sliding door were cracked. The two panes could slide behind one fixed pane such that the broken mirror panes were hidden behind the fixed pane, which was not broken. A sketch demonstration was produced in court to show how the panes converged to the fixed one thus hiding the shattering. The Appellant disputed that evidence by averring that it was not possible to conceal the cracks with the fixed pane.

- [13] The Respondents said that it was upon taking occupation of the property that they discovered that the kitchen windows had been

fitted backwards and only opened to the inside. During rain storms, a substantial amount of water leaked through the kitchen windows. They conceded that there were burglar guards fitted on the outside of such windows. The backwards fitting was not shown to them by the Appellant or her agent. To correct the defect they had to remove these windows and replace them with sliding windows which turned out to be expensive. On this aspect, the Appellant testified that she was aware of the leak which happened occasionally when it rained heavily. She forgot to tell her agent and the Respondents about this.

[14] The Second Respondent testified that the Respondents only discovered that there was a bathroom upon taking occupation. The bathroom was never showed to them when they viewed the property as it is only discovered upon opening one of the cupboard doors in a built in cupboard in the office. However, they were pleasantly surprised until they discovered that the bathroom had obvious signs of heavy leaking such as sagging ceilings through which holes has been punched to release the water. They would have seen the damage had the bathroom been shown to them at the time of viewing the property. A substantial amount of water leaked through the roof when it rained.

[15] In respect of the leaking thatch carport the evidence of the Respondents was that when it rains, there was a substantial amount of water that leaks into the garage. They only became aware of the problem when it rained after occupying the property. The Appellant

testified that after winter season the thatch would leak after a storm. It was an annual thing. Sometimes it would not stop leaking

and then they would have to get repairers in, but they did maintenance every two years. As this roof was near trees, leaves had

to be brushed off the roof constantly before they created damp sports on the roof. She did not tell the agent anything about the thatch, the care, the maintenance or the dangers of storms. Patches on the thatched roof left visible signs of leaks.

[16] The court a quo found that the Respondents had discharged the onus of proof placed on them on a balance of probabilities and accepted their version as more probable and credible. It found that all the defects identified by the Respondents were not readily visible upon inspection and were therefore latent. It then granted judgment in their favour and ordered the Appellant to pay damages with costs of the action.

Appeal

[17] When initiating the appeal the Appellant had not been furnished by transcribers with a full transcript of the trial record. It was only after months of investigations that the recording was made available and a transcript arranged for. As such the Appellant failed to comply with rule 50 (7) (a). An application for condonation for the late filing of the record of appeal was heard unopposed on the appeal hearing date and condonation was granted.

[18] The Appellant concedes that the house she sold to the Respondents had defects but contended that such were patent and not latent. The Appellant contended that:

- 1) She was protected by the voetstoots clause and that she could not be held responsible for any diseases or defects in the property. The submission was that the buyer had an opportunity to inspect the property before buying it and that therefore, against patent defects, the buyer has no recourse against the seller.

- 2) In respect of the electric fence, the submission is that the fence had a latent defect which the Appellant was unaware of, as the fence made ticking sounds, she thought it was working.
- 3) In respect of the pool pump and the filter, the Appellant warranted that these were in normal working order but there was no warranty against every day wear and tear.
- 4) On the electrical compliance certificate, the Appellant secured the services of an electrician who had issued a certificate on the

strength of which transfer of ownership of the house was effected. Notwithstanding their reservations, the Respondents accepted the certificate of compliance and allowed the property to be transferred.

Legal principles

[19] The Appellant has relied on the principle of voetstoots to avoid contractual liability after she had sold her property to the

Respondents. It is accepted that “voetstoots” is the action of buying something “as is” or “just as it stands” and the seller may not be held responsible for any diseases or defects in respect of the merx.[1] In *Legadima Garden Services CC v Lightstorm Electrical CC*[2], the court held that a seller may be able to hide behind the voetstoots clause between the parties only where the seller was not

aware of the defects and as such did not conceal them from the purchaser or where no warranty, expressly, impliedly or tacitly was given to the purchaser by the seller.

[20] It remains the duty of the seller to deliver the merx sold to the buyer without defects. Where the merx is latently defective, delivery is not considered to be in accordance with the contract in instances where the seller fraudulently conceals the defect in the merx sold or in an instance where the seller gives an express warranty that the thing sold is free of the particular defect. For the buyer to get around the seller’s exemption in such circumstances through the voetstoots clause, he or she would have to prove that the seller at the time of the conclusion of the contract was aware of the existence of the latent defect in the merx sold and deliberately concealed the existence of the defect to the purchaser or refrained from informing the purchaser of its existence.[3]

Evaluation

1. The Voetstoots defense

[21] . Counsel for the Appellant submitted that all defects, except the electric fence, were patent and visible upon mere inspection.

Further, as the argument goes, the Respondents had an opportunity to inspect the house thoroughly before buying it, however they elected not to.

[22] In my view, the existence of the defects has become common cause between the parties as well as the fact that they were not shown or disclosed to the Respondents. There is no evidence to corroborate the Appellant's version that the defects were readily visible. It is on record that the licking thatch roofs and walls could only be detected on a rainy day and there is no evidence that the Respondents came on a rainy day to inspect the property. Evidence of the hidden bathroom which had drilled ceilings remained unassailable as the agent of the Appellant was never called to testify. The defects constituted by the licks were therefore latent in nature. The Appellant has failed to demonstrate her bona fides in not disclosing these defects and therefore the appeal falls to be dismissed on this ground.

[22] In respect of the house keys, the Appellant admitted that at all times she knew that there were no keys for the front door. No valid explanation was proffered on why this was not disclosed to the Respondents. As regards the cracked mirror panes the court a quo had the benefit of watching witnesses who testified on the issue. A sketch demonstration was presented to court. Appellant's

version amounts to nothing but a bare denial of this defect. The agent who showed the respondents around the property was not called

to testify and therefore this piece of evidence remained uncontroverted. The appeal falls to be dismissed on this ground.

2. The electric fence

[23] Counsel for the appellant submitted that the fence had a latent defect which the Appellant was unaware of since it made ticking

sounds which made her think that it was working well. The evidence of Mr. Holt for the Respondents was that only an expert was able to determine the issue with the fence. Upon collecting the keys of the property the Appellant showed the Respondents the energizer for the electric fence in the garage. The Appellant advised the Respondents not to touch the board as it had shocked her gardener a few times. This was vital information which was not communicated to the Respondents when they came to inspect the property. In as much as the Appellant was no expert on electric fence, she had important information about a defect in the fence which on a number of occasions had shocked a human being. No innocent explanation was proffered by the Appellant why this dangerous situation was not explained to the Respondents at the critical decision making period on whether or not to buy the property. The only reasonable inference to draw from this is that the Appellant deliberately concealed this information. The appeal falls to be dismissed on this ground as well.

3. The pool pump and the pool filter

[24] The warranty in respect of fixtures and fittings included the pool filter and the automatic pool cleaner. In this respect the Second Respondent testified that after taking occupation of the property it came to her attention that the pool pump and the filter were not working as they should have and eventually stopped working. Mr. Cullen inspected the pool only to find

that the entire pool filter and pump had to be replaced as both were not in working order. The damage to the pool pump was due to wear and tear and years of being used and had to be replaced. Clearly therefore the warranty given by the Appellant was not good enough to serve the purpose for which it was intended. The pump and the filter showed years of wear and tear. This defect was discovered in about a month since the Respondents moved into the property. This ground of appeal lacks merits and should therefore also fail.

4. The electrical compliance certificate

[25] The Electrical Compliance Certificate provided by the Appellant to Respondents was invalid and the Respondents said they suffered

damages as a result thereof when the electrician engaged by the Appellant failed to correct the faults. Even after the ownership of the house was transferred to the Respondents, the Appellant accepted her responsibility to sort out the problem. It was only when her electrician failed to remedy the defect within a reasonable time period that the Respondents engaged the services of their

electrician. Failure to provide a valid electrical compliance certificate was a clear breach of the contractual term in this regard

and the breach was not limited to time before the transfer, as contended by the Appellant. This ground of appeal stands to be dismissed.

[26] In conclusion, it was Appellant testimony that she had decided not to fix any faults on the premises because she accepted a low offer. This approach to resolve her gripe in accepting a low offer is telling in why she did not disclose faults in the house of which she was aware for some time.

Order:

I accordingly propose that the appeal be dismissed with costs.

H Cele.AJ

I agree/ disagree.

M Twala J

Appearances

For the Appellant:

Adv. J Scallan

For the respondent

Adv. K Potgieter

[1] Kerr: The Law of Sale and Lease (2004) at page 150: Odendaal v Ferraris 2009 (4) SA 313 (SCA).

[2]

[2017] JOL 38393 (GP).

[3] Beyers NO and Another v Ackerman [2007] 3 All SA 125 (C)

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Prepared on 11 October 2026 · Esheria