

SOUTH AFRICA / JUDGMENT

Werner and Another v Barnard N.O and Others (8903/2021P) [2023] ZAKZPHC 33 (17 March 2023) [2023] ZAKZPHC 33

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

E Bezuidenhout

CASE / FILE NUMBER

8903/2021P

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Case

No: 8903/2021P

In

the matter between:

DENVER
CAMERON
WERNER
First Applicant
KELLY
LERRIENE
WERNER
Second Applicant
and
PAULA
BARNARD
N.O.
First Respondent

THEODORE
LEONARD DUCKITT
Second Respondent
LINDI
DUCKITT
Third Respondent
THE
MASTER OF THE HIGH COURT,
PIETERMARITZBURG
Fourth Respondent
ORDER
1.
The application is dismissed with costs, such costs to include
the
costs reserved on 13 October 2021.

JUDGMENT

E BEZUIDENHOUT J

Introduction

- [1] The applicants, Mr Denver Cameron Werner and Ms Kelly Lerriene Werner brought an application on an urgent basis, seeking interdictory relief in part A of the notice of motion and thereafter declaratory relief, as set out in part B of the notice of motion. The matter was set down for hearing on 13 October 2021.
- [2] In part A of the notice of motion, the applicants sought an order interdicting the first respondent, Ms Paula Barnard, in her capacity of executrix of the estate of the late Aletta Maria Duckitt (the estate) from finalising the estate pending the outcome of the application for the relief set out in part B. The applicants also sought an order that the first respondent pay costs of the application de bonis propriis, on the attorney and client scale.
- [3] In the part B of the notice of motion, the applicants sought the following declaratory relief:
 - (a) That the first respondent failed to grant the applicants vacant possession of the property described as Erf [....] A [....], [....] AP S [....] Road, A [....] (the property).
 - (b) That the first respondent is responsible for doing whatever is necessary to obtain a Certificate of Occupation from the Msunduzi Municipality in respect of the property.
 - (c) That the first respondent is required to furnish the applicants with the said certificate of occupation prior to the finalization of the estate.

- [4] The second and third respondents, Mr Theodore Duckitt and Ms Lindi Duckitt, were the heirs to the estate and no relief was sought against them, save in the event of them opposing the application, in which event a joint contribution towards costs would be sought. The fourth respondent was the Master of the High Court, KwaZulu-Natal, against whom no relief was sought
- [5] The first, second and third respondents opposed the application and subsequently filed answering affidavits. The fourth respondent only filed a report in which it stated that the first respondent had not yet been discharged from her duties.
- [6] On 13 October 2021 no relief was granted and the matter was simply adjourned sine die. The matter subsequently came before me as an opposed motion

The applicants' case

- [7] The facts set out in the first applicant's founding affidavit are rather brief and lacking in detail. It is alleged that the first respondent sold the property, which was an asset in the estate, on 1 September 2020 to the applicants.
- [8] It is alleged that in terms of the agreement of sale, the applicants would be granted vacant possession of the property upon registration of transfer. Clause 2 of the agreement of sale, which was annexed to the founding affidavit, refers to 'vacant occupation' being given upon registration of transfer.
- [9] The applicants apparently took occupation of the property on 4 August 2021.
- [10] It is alleged that the property was sold without an occupancy certificate, which is a mandatory requirement for the occupancy of immovable property in terms of section 14(4) (a) of the National Building Regulations and Building Standards Act 103 of 1977 (the Act).
- [11] The applicants annexed an email to their papers, which emanated from the Msunduzi Municipality, dated 26 August 2021, and in particular from Mr Bongeka Mnyandu, who is a building inspector. In the email, addressed to the first respondent, he indicates that he conducted an inspection on 25 August 2021 and that the property is not ready to be occupied. He advised 'clients' to vacate the house immediately. He referred to a number of certificates being outstanding, namely completion certificates for the structural and storm water, an electrical compliance certificate, a plumbers' compliance certificate, a glazing certificate, a gas installation certificate and a soil poisoning certificate.
- [12] The applicants allege that the first respondent was obliged to give them 'vacant possession' which means lawful possession. The first respondent could not have granted 'vacant possession' of the property to the applicants on registration of transfer without also ensuring that a certificate of occupancy was delivered to the applicants.

- [12] The interdictory relief set out in part A of the notice of motion was no longer an issue and the applicants were only pursuing the relief in part B. I therefore do not consider it necessary to deal in detail with the allegations made regarding the requirements for an interim interdict.

The first respondent's case

- [13] The first respondent pointed out that the applicants failed to specify precisely or quantify the scale of the defects in the property. They appear to say that they have purchased and taken transfer of a residential property from the estate and allege that the improvements to the property suffer from either patent or latent defects.
- [14] The first respondent stated that the property was registered in the names of the applicants on 8 July 2021. She referred to section 14(1) of the Act which provides that an 'owner of a building... or any person having interest therein', may apply for and be issued with a certificate of occupancy. The first respondent alleges that she ceased to be the owner of the property on 8 July 2021 and that she lacked legal standing to apply for and obtain an occupancy certificate. It would be impossible for her to comply with such an order.
- [15] The first respondent further stated that there was no contractual obligation on her to obtain an occupancy certificate and it was not specified as a term in the written sale agreement.
- [16] By way of background, the first respondent states that she is in possession of the building plans of the property, which previously belonged to a Mr and Mrs Duckitt, both now deceased. The plans were approved by the municipality in February 1992 and October 1993. The first respondent did not know when the building work commenced. The late Mr Duckitt himself was the builder. He passed away on 27 December 2018. Thereafter his son, the second respondent, attended to the completion of the building works, which he financed himself. Mrs Duckitt passed away on 5 April 2020. She previously inherited the entire estate, which included the property, from her husband. The second and third respondents are the only heirs.
- [17] The first respondent further contends that the second and third respondents engaged in the process of selling the property and presented her with the sale agreement, attached to the application papers, to sign in her capacity as executrix. She understood that it was negotiated between the applicants and the second and third respondents. On or about 20 November 2020, the second and third respondents negotiated an amendment to the sale agreement without any reference to her wherein a reduction in the purchase price was agreed. The first respondent likewise signed the addendum which was also attached to the application papers.
- [18] The first respondent recorded the sale of the property at the amended price of R3.25 million in the amended First and Final Liquidation and Distribution Account in terms of which the proceeds, less inter alia the claim in respect of the repairs and completion of the building on the property, would be paid to the second and third respondents in equal shares.

- [19] On 27 July 2021, the second and third respondents were paid their inheritances. The claim in respect of the repairs and completion of the property was for the amount of R559 660.93 and was paid on 22 September 2021, leaving the estate account with a zero balance. On 10 November 2021 a payment of R19 398.76 was received from the Msunduzi Municipality into the estate account.
- [20] In dealing with certain of the allegations in the first applicants' affidavit, the first respondent denied that an occupancy certificate is a mandatory requirement for the sale of an immovable property. The first respondent further stated that vacant occupation passed to the applicants on 4 August 2021. The first respondent denied that there is any obligation on her as the executrix to effect repairs and obtain an occupancy certificate.
- [21] The first respondent referred to the email sent by the building inspector, Mr Mnyandu on 26 August
2021. She stated that by August 2021 the applicants were in physical occupation of the property. She requested the building inspector to inspect the building to address certain complaints received for the applicants regarding alleged defects in the building. She also wanted an impartial verification and assessment of any possible defects.

The second and third respondents' case

- [22] The second respondent deposed to an affidavit on behalf of himself and the third respondent. He contended that the relief sought by the applicants in part B of the notice motion was incompetent. They have elected not to cancel the agreement in consequence of the alleged defect and their remedy is to institute an action for damages.
- [23] The second respondent referred to the so called 'voetstoots' clause in the sale agreement and further alleged that there is no obligation on a seller to furnish a purchaser of an immovable property with an occupation certificate. The applicants have failed to advance any reasons why they as current owners cannot apply for the occupancy certificate.
- [24] The second respondent proceeded to place certain additional facts on record which would not be within the knowledge of the first respondent. He stated that his parents lived on the property for 25 years. His father was a builder and commenced with the construction of the house after the plans were approved in 1992 and 1993. His father completed the construction of all the "wet works" but then ran out of money. All the brickwork and plastering was completed and the roof was installed. The internal fixtures such as the kitchen and bathrooms were incomplete. His parents moved into the downstairs section of the house whilst his father slowly worked towards finishing the house, which he never did.

- [25] The second respondent employed contractors to assist with the completion of the house whilst his mother was still there, sparing no expense. His mother however moved out of the house around the end of 2019, due to ill health and subsequently passed away in April 2020. At the time the work on the house was almost complete. All that remained was for the kitchen to be installed and a 'few snags' to be attended to.
- [26] The second respondent and his sister decided to sell the house and it was listed with Remax in Pietemaritzburg. Remax was then approached by Maritzburg Property Consultants who introduced the applicants as the prospective buyers. Subsequently the agreement of sale was entered into.
- [27] Some time prior to the registration of transfer, the applicants requested to be allowed to clear some bush on the property, which the second respondent agreed to. Thereafter at around April 2021, the agent at Remax furnished the applicants with the keys to the property. When the second and third respondent visited the property shortly thereafter, they noticed that about 2 acres of bush had been cleared. The property was around 5 acres in extent. There were also TLB's, tipper trucks, a caravan and other earthmoving equipment parked on the property.
- [28] On another visit to property, before the registration of transfer on 8 July 2021, the second and third respondent noticed that the applicants had started building a swimming pool and installed CCTV security systems. Shutters had also been installed in the house. They were unable to say if the applicants had in fact moved into the property but they certainly had occupation of it since at least April 2021.
- [29] The second respondent alleges that the applicants started complaining about certain issues relating to the electric fence and the plumbing – apparently 'a smell' was coming into the house. The second respondent left the first respondent to deal with the issues as he took the view that the property had been sold voetstoots and that the applicants knew they bought the property from a deceased estate. He was clear that neither he nor the third respondent were aware of any defects at the time of the sale. He further denied the existence of any such defects.

The applicants' reply

- [30] The first applicant's replying affidavit disputed very little of any of the factual allegations made by the second respondent. He denied that the house on the property was basically complete with only a few snags left to attend to. He alleged that if that was the case, the municipality would not have refused to issue the certificate of occupation.
- [31] The first applicant did not dispute and merely 'noted' the allegations pertaining to how they came to purchase the property, when and how they took occupation of the property and what occurred before and after transfer took place. The first applicant remained adamant that the first respondent be held responsible for obtaining the occupancy certificate, despite the fact that it is in fact the second respondent who employed and paid builders to complete

the outstanding work and who clearly did not do what was allegedly required to obtain a certificate. If anyone should be hold responsible it is surely the builders who did the work.

- [32] The first applicant makes it clear that the applicants' case has nothing to do with any patent or latent defects. It has to do with the granting of vacant possession. The purpose of the sale was to provide them with a residential property to live in which is impossible because the municipality has threatened to demolish the property as a result of a lack of an occupation certificate. The applicants are enforcing the contract by requiring the first respondent to make good on the sale and deliver vacant possession. Occupation is not vacant if it is unlawful, they contend. The applicants are enforcing a contractual claim to vacant possession.

Discussion

- [33] The applicants have placed reliance on section 14(4)(a) of the Act. Section 14 relates to certificates of occupancy in respect of buildings. The relevant portions read as follows:

'(1) A local authority shall within 14 days after the owner of a building of which the erection has been completed, or any person having an interest therein, has requested it in writing to issue a certificate of occupancy in respect of such building-

- (a) issue such certificate of occupancy if it is of the opinion that such building has been erected in accordance with the provisions of this Act and the conditions on which approval was granted in terms of section 7, and if certificates issued in terms of the provisions of subsection (2) and, where applicable, subsection (2A), in respect of such building have been submitted to it;
- (b) in writing notify such owner or person that it refuses to issue such certificate of occupancy if it is not so satisfied or if a certificate has not been so issued and submitted to it.

(1A) The local authority may, at the request of the owner of the building or any other person having an interest therein, grant permission in writing to use the building before the issue of the certificate of occupancy referred to in subsection (1), for such period and on such conditions as maybe specified in such permission, which period and conditions may be extended or altered, as the case may be, by such local authority.

...

(4)(a) The owner of any building or, any person having an interest therein, erected or being erected with the approval of a local authority, who occupies or uses such building or permits the occupation or use of such building-

- (i) unless a certificate of occupancy has been issued in terms of subsection (1)(a) in respect of such building;
- (ii) ...

(iii) during any period not being the period in respect of which such local authority has granted permission in writing for the occupation or use of such building or in contravention of any condition on which such permission has been granted; or,

(iv) . . .

shall be guilty of an offence.’

[34] The first, second and third respondents’ relied on the so called ‘Voetstoets’ clause which is incorporated in the clause 5 the agreement of sale. It reads as follows:

‘The Property is sold VOETSTOOTS. The PURCHASER is absolutely presumed to have made him/herself acquainted with the property hereby purchased, its nature, extent, boundaries and locality and furthermore where buildings are involved, the condition throughout including brickwork, floors, roofing, all timbers, fixtures and fittings, plumbing and electrical installations etc..., and agrees to accept the same “voetstoets” (as it stands) the SELLER being absolutely free from all liability for any detect whether patent or latent, error of description or otherwise howsoever...’

[35] It was submitted on behalf of the applicants that the voetstoets clause finds no application as the lack of an occupancy certificate is not covered by the voetstoets clause. Reliance was placed on *Ornelas v Andrews Café*.^[1] It was submitted that the requirement of vacant possession must also incorporate lawful possession, which cannot happen without an occupancy certificate. It was submitted that the municipality has found that the property is unfit for habitation. This is off course not factually correct because the email from the building inspector being relied upon simply states that Mr Mnyandu had ‘advised clients to vacate the house immediately’.

[36] Counsel for the applicant also conceded that the applicants failed to disclose in the founding papers, or in the reply for that matter, what the actual problems with the property were. The building inspector’s email only refers to a list of certificates which are outstanding and an issue with the sewer and storm water.

[37] Counsel for the applicant also placed reliance on *Naidoo v Moodley NO*^[2] where Van Zyl J on appeal dealt with a matter where transfer of a property could not take place because no clearance certificate had been issued by the municipality. The municipality refused to issue the required clearance certificate because previously no certificate of occupancy had ever been issued in respect of the property. The court held at para 19 that ‘the lack of an occupation certificate and the work required by the municipality before it would issue one, are not defects of a physical nature relevant to the property and the defendants could find no protection under the voetstoets provisions ...of the agreement of sale.’

[38] Counsel for the appellant in Naidoo submitted that it was an implied term of the agreement that occupation had to be given upon transfer and that such occupation must be lawful. He referred to what was stated in *Van Nieuwkerk v McCrae*[3] where the court held that a purchaser is entitled to assume that a building has been erected in compliance with all statutory requirements and that it can be used to its full extent. The court likewise held[4] that the term *voetstoots* does not apply to the lack of certain qualities of characteristics.

[39] In *Odendaal v Ferraris*[5] the court held that a *voetstoots* clause however covered absence of statutory authorization. Cachalia JA held at para 22:

‘By contrast, the absence of the statutory approvals for building alterations, or the other authorisations that render the property compliant with prescribed building standards, such as were at issue in *Van Nieuwkerk*, and are at issue here, does not render the property unfit for the purpose for which it was purchased. The respondent does not allege, nor could he, that the permissions relating to the outbuilding and carport render the property unfit for habitation. Nor does he allege that the municipality proposes to enjoin him from living on the property, or that he is incapable of acquiring the

permissions necessary to render the alterations compliant with statutory provisions. The appellant did not deliver to him “something

different from what was bought” as in *Ornelas*. On the contrary, he received exactly what he purchased, namely an ideally located, spacious dwelling house with ample parking space.’

And further at para 26:

‘In my view, therefore, the absence of statutory approval such as is at issue here, and was at issue in *Van Nieuwkerk*, constitutes a latent defect. The lack of permission in respect of both the manhole over the sewer . . . are defects which interfere with the ordinary use of the property - thus satisfying the *Holmdene Brickworks* test - and are therefore latent defects . . . The fact that they also contravene building regulations does not change their character. To the extent that *Van Nieuwkerk* suggests otherwise I respectfully disagree with it.’

[40] It should also be remembered that in Naidoo, *Nieuwkerk* and *Odendaal* transfer had not yet taken place and the sellers were clearly obliged to give registration of transfer. In the present matter transfer had taken place in July 2021 and the applicants had already been provided with the keys to the property in April 2021.

[41] In *Wierda Road West Properties (Pty) Ltd v Sizwe Ntsaluba Gobodo Inc*[6] it was held that the absence of an occupancy certificate did not invalidate the lease. Majiedt JA[7] referred in particular to section 14(1A) of the Act and held that the Act does not expressly place a prohibition on the occupation of a building without an occupancy certificate having been issued. It merely creates a statutory offense.

- [42] In returning to the applicant's main contention that vacant possession (defined as free and unburdened possession or *vacua possessio*)[8] equates to lawful possession, I was urged to consider developing the common law based on the notion that it is reprehensible to sell a *merx* when the seller is aware that the buyer cannot use it for its intended purpose.
- [43] It is trite that the essentialia of an agreement of purchase and sale are mutual consent or agreement between the parties, the thing to be sold and the price for which it is to be sold. [9] In terms of the common law the seller further has an obligation to take care of the thing sold until it is handed over and then to make the thing available to the buyer and ultimately to transfer ownership.[10] The seller is obliged to make available what was sold.[11]
- [44] In Norman's Law of Purchase and Sale in South Africa, the authors [12] deal with the duty to deliver the property free from burdens not specifically stated at the time of the sale, referred to as the guarantee of *vacua possessio*. Where there was a burden like for example a servitude,
- 'the purchaser was awarded a reduction in price commensurate with the reduced value, that is, a *quantum minoris* reduction. It is also implicit in these decisions that all such burdens, if concealed, are latent defects interfering with the purpose for which the land was bought, namely *vacua possessio*, and the award of so-called damages was a reduction of price by the action *quantum minoris*'.
- [45] There is of course an inaccuracy in the statement made by applicant's counsel. The first respondent by all accounts had no knowledge of the lack of an occupancy certificate at the time of entering into the sale agreement.
- [46] Counsel for the first respondent submitted that the knowledge of the deceased cannot be imputed to the executor of the estate. Reliance was placed on *Van den Bergh v Coetzee*[13] where it was held that the executor 'does not step into the shoes' of the deceased.
- [47] It was also submitted that there is no information on what exactly the defects are or what the Municipality found. It is furthermore open to the applicants to resile from the contract. Most important of all though was that transfer took place without any problems.
- [48] Counsel for the second and third respondents submitted that the applicants were given vacant possession, being free and undisturbed possession as held in *Tshandu v City Council of Johannesburg*[14] and *York & Co Pty Ltd v Jones NO*.[15] It was further submitted that the applicants were doing as they pleased on the property after taking occupation. The property is 21 000m² and the applicants levelled 2000m² where they stored plant and machinery. They built a swimming pool. It was submitted that any latent defects are hit by the *voetstoots* clause, which includes lack of statutory compliance.
- [49] The applicants seek an order declaring that the first respondent has failed to grant them vacant possession. In my view the first respondent did all that was required of her as executor. The applicants clearly received vacant possession. The applicants received what they purchased. They had no concerns about what they were purchasing and there is no

indication in the papers that they enquired about the occupancy certificate at the time of the sale or prior to taking transfer. They have alternatives available to them as set out in section 14(1A) of the Act and failed to explain why, as the owner of the property, they have not taken any of the steps available to them. If the lack of an occupancy certificate amounts to a 'burden', which I expressly decline to make a finding on, the applicants have remedies available to them.

[50] In light of the above I am further of the view that there is no obligation on the first respondent to obtain an occupancy certificate and to furnish it to the applicants prior to the finalization of the estate, or at all, for that matter. In as far as I was urged to develop the common law, I see no need for that, especially in light of the authorities referred to above.

[51] The application in my view was ill advised and in particular the format in which the relief was sought was ill considered and not appropriate. While I understand that there was a certain amount of frustration at the actions of the first respondent, careful consideration should be given to a matter and the appropriate relief to be sought before embarking on any legal action.

[52] As far as costs are concerned, I see no reason to deviate from the usual position that costs should follow the result. Counsel for the first respondent drew my attention to the fact that previously on 13 October 2021 the costs were reserved. I will address this in the order.

[53] I accordingly make the following order:

1. The application is dismissed with costs, such costs to include the costs reserved on 13 October 2021.

E Bezuidenhout J

Date reserved:

7 November 2022

Date delivered:

17 March 2023

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Health, when it choose to participate in or Piggyback ;askdfjoiksdfjioicvm,asdfjkl;

[1] Ornelas v Andrews Café and another 1980 (1) SA 378 (W) at 388G to 390C.

[2] Naidoo and another v Moodley NO and others

[2008] ZAKZHC 95.

[3] Van Nieuwkerk v McCrae 2007 (5) SA 21 (W) at 28D-E.

[4] Van Nieuwkerk v McCrae supra at 29A-C.

[5] Odendaal v Ferraris 2009

(4) SA 313 (SCA).

- [6] Wierda Road West Properties (Pty) Ltd v Sizwe Ntsaluba Gobodo Inc.
[2017] ZASCA 170, 2018 (3) SA 95 (SCA).
- [7] Wierda Road West Properties (Pty) Ltd v Sizwe Ntsaluba Gobodo Inc.
[2017] ZASCA 170, 2018 (3) SA 95 (SCA) para 20.
- [8] VL Hiemstra and HL Gonin Trilingual Legal Dictionary 3 ed (1992) at 303.
- [9] G Glover Kerr's Law of Sale and Lease 4 ed (2014) at 3 – 5.
- [10] G Glover Kerr's Law of Sale and Lease 4 ed (2014) at 141 – 142, and 162.
- [11] G Glover Kerr's Law of Sale and Lease 4 ed (2014) at 146.
- [12] RH Zulman and G Kairinas Norman's Law of Purchase and Sale in South Africa 5 ed (2005) at p 155.
- [13] Van den Bergh v Coetzee 2001
(4) SA 93 (T) at 95H.
- [14] Tshandu v City Council of Johannesburg 1947
(1) SA 494 (W) at 497.
- [15] York & Co Pty Ltd v Jones NO 1962 (1) SA 65 (SR).

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