

Monday Contemplation No 33

The property has a defect, I want my money back!

In this week's post, we discuss the very interesting case of **Daphne Chuma v Bondcor (Pty) Ltd, Werner Serfontein and Standard Bank of South Africa Ltd**. The judgment was handed down in September 2023.

1. The facts of the case were as follows:

2. On **4 August 2017** the plaintiff (Ms Chuma) and the first defendant (Bondcor), represented by the second defendant (Mr Serfontein), concluded an agreement in terms of which Bondcor sold a vacant stand to Ms Chuma for R600 000. Some of the important provisions of the agreement of sale provided, amongst other things, that:

a. Ms Chuma was to pay a deposit of R270 000 by **30 August 2017**;

b. The sales agreement was also subject to Ms Chuma obtaining a mortgage bond to cover the purchase price; and

c. The purchaser indemnifies the seller against any latent defects in the property (voetstoots clause).

3. On **4 September 2017** the purchaser (plaintiff) paid the deposit in the amount of R270 000. The purchaser also paid the transfer fees in the amount of R17 082 29.

4. On **13 December 2017** the property was registered in the name of the plaintiff (purchaser) after the third defendant, Standard Bank Ltd, approved the plaintiff's bond and registered a mortgage bond over the property.

5. The purchaser testified that during 2017, she had seen a vacant piece of land that was for sale. The purchaser contacted the estate agent, a Mr Vorster, who confirmed that the property was on sale and that it came with approved plans for a double storey house. However, the estate agent did not provide Ms Chuma with the plans. Ms Chuma testified that she informed the estate agent that she was interested in buying the property as she had plans to build herself a house.

After signing the offer to purchase, Ms Chuma had her own plans drawn for a single storey house. On submission of the plans to the relevant municipality, **she did not obtain approval for the plans**. The municipality informed her that there were no current approved plans and that there had been plans previously approved, which had since lapsed, as no building works took place within 12 months of their approval, as prescribed by the local regulations. She was further informed that the property was underlain by dolomite and that a dolomite stability investigation was required.

6. As a result of the information received from the municipality, Ms Chuma appointed an engineer to conduct a dolomite stability study of the property.

7. Ms Chuma further testified that she was actually able to obtain a copy of the previously approved plans, via Mr Vorster, and together with the lapsed building plans, Ms Chuma discovered that there was a geological report on the property that had been prepared many years prior.

8. Ms Chuma told the court, that had she been aware of the initial geological report, she would not have purchased the property as the purpose of purchasing the property was to

build a residential dwelling. As a result of the dolomitic nature of the property, she could not use the property to build a house even though it was zoned 'residential'.

She further testified **that the latent defect** was not visible to the naked eye.

9. Ms Chuma's engineer testified that the site would be unsuitable for residential development and had no resale value from a residential point of view.

10. Mr Serfontein (second defendant) testified, that he was the sole director of Bondcor (seller) and had purchased the property in question in 2016 at an auction for R160 000.

After seeing pictures of the property he had gone to the municipal offices and discovered that there were approved building plans for the property and also that the file contained a report from a geotechnical engineer, but he had not bothered to look at the plans or the geotechnical report. When he decided to sell the property he instructed an estate agent to market and sell the property together with the building plans.

11. Mr Serfontein told the Court that it was only in 2019 that he became aware of the contents of the geotechnical engineer's report, but according to the report the property was suitable to build two residential units subject to certain remedial action taken with regard to the foundation to be laid.

12. Mr Serfontein also indicated that at the time that Bondcor sold the land to Ms Chuma, he was a candidate attorney at a conveyancing law firm, that attended to the transfer of the property. He was in fact the person within the law firm responsible for the transfer and registration of the property in the name of the purchaser.

13. Mr Serfontein conceded that as he was employed in the department dealing with property transfers at the law firm, he had specific knowledge in the purchasing and sale of immovable property. He also admitted that he had knowledge of the dolomitic stagnant conditions prevailing in the Centurion and Lyttleton areas. Mr Serfontein also testified that he had not taken any notice of the title deed, which contained this condition:

"An engineer must be appointed before building plans are submitted, who must submit, together with the building plans, a certificate which states that he has studied the relevant geological report and that he has established the necessary measures with regard to building work, drainage of the buildings and the site and the installation of wet services so that the entire development is safe as far as possible from a geological point of view".

14. Mr Serfontein's advocate argued that the seller of the property would be protected by the voetstoets clause in the agreement of sale.

15. **The Judge said that a seller cannot use a voetstoets clause as a defence** in the case where a seller was aware of the latent defect and failed to disclose it to the purchaser before the conclusion of the contract.

16. The Judge referred to a remedy available to a purchaser where goods are defective, called the action redhibitoria, which is a remedy in our law entitling a purchaser to return of the purchase price paid if they can prove that that they would not have bought the goods if they had known of the defect.

17. The Judge was further of the view, that Mr Serfontein knew that Ms Chuma wanted to build a house and that, given Mr Serfontein's knowledge and experience, that **he**

fraudulently failed to disclose the latent defect in the property and could not rely on the voetstoets clause in the contract.

18. **The Judge ruled that the seller had to repay Ms Chuma** the sum of R600 000, being the purchase price, interest at the rate of 10.25% per annum on the purchase price from the date Ms Chuma and Standard Bank had entered into a mortgage bond agreement until the date of judgement, being September 2023, an amount of R20 127.38 in respect of rates and taxes and any other municipal services paid to date in respect of the property.

The seller was also ordered to pay Ms Chuma R17 082.29 that she had paid for transfer costs, as well as her legal fees incurred for the court case.

There are many interesting things to learn from this case, which I will discuss in next week's post.