

Monday Contemplation No 8

Much ado about latent defects

The issue of defects is often quite thorny when it comes to property transactions. The recent case of *Le Roux v Zietsman and Another* [2023] ZASCA 102 is quite instructive in this regard.

The facts of this case are briefly as follows:

1. Zietsman bought a property which was being used as a guesthouse from Le Roux.
2. Three months after the buyer took occupation of the property, but prior to transfer, it rained very heavily and there was extensive leaking through the roof.
3. The guesthouse was flooded and furniture and linen were damaged as a result of the leaking.
4. The buyer had to raise additional funds to attend to the repairs and the guesthouse was not able to operate for a period of two months while the repairs were being undertaken.
5. The buyer sued the seller in the Regional Court for the cost of repairs (around R240 000) as well as loss of income (around R100 000).
6. The basis of the claim for the buyer for the cost of repairs of some R240 000, **was fraudulent non-disclosure**. In other words, the seller knew there were defects in the roof and therefore had a duty to disclose those defects and because he did not do so, the seller was therefore guilty of fraudulent non-disclosure. The voetstoots clause in the agreement of sale was therefore inapplicable in this case.
7. The seller's denied that he did not disclose or misrepresented that the roof leaked. He alleged that this had in fact been disclosed to the buyer. The seller was also of the opinion that he was protected from any liability due to the voetstoots clause in the agreement of sale.
8. The Regional Court found in favour of the buyer on the basis of fraudulent non-disclosure.
9. The seller appealed to the High Court, where the appeal was dismissed with costs. The seller then appealed to the Supreme Court of Appeal.
10. The Appeal Court was clear that the single issue to be decided was, "...whether the appellant, knowing the purpose for which the property was to be used, and having knowledge of the latent defect in the property (the leaking roof), fraudulently failed to disclose same to the respondents before the sale with the aim to induce the sale."
11. One of the pieces of evidence lead in the Appeal Court, was that, on the first visit to the property, the buyer as well as the property practitioner (PP), noticed water stains on the ceiling of two of the bedrooms. The seller indicated the leaks had been fixed by a handyman.
12. An expert witness on behalf of the buyer, testified that the cause of the leaking roof was inferior design of the roof structure and inferior workmanship. The expert witness

indicated that there was evidence that the attempts had been made to seal off the leaks and that any claim by the seller that there were no problems with the roof leaking would be impossible and untruthful.

13. The Appeal Court found that the seller had a duty to disclose the latent defects in the roof, which the seller must have been aware of.

14. The Appeal Court found further that the non-disclosures made by the seller, were made deliberately in order to induce the sale and this constituted fraud.

15. The Appeal Court held in favour of the buyer and dismissed the seller's appeal with costs.

In our next Monday Contemplation, we will discuss the responsibilities of the property practitioner (PP) when it comes to defects in a property.