Monday Contemplation No 60
Elements of a contract of sale – Part 10

For the last nine weeks, we have been discussing various elements of a contract of sale of immovable property. Part 10 will be the last in this series.

I have previously discussed the case of **Daphne Chuma v Bondcor (Pty) Ltd, Werner Serfontein and Standard Bank of South Africa Ltd.**

In summary, the case related to a piece of land that was sold that had serious dolomitic conditions making building on the land very difficult and costly. The Judge in the case ruled that the seller knew that the buyer wanted to build a house on the problematic piece of land and that, given the seller's knowledge of the problem and experience in the property industry, that he fraudulently failed to disclose the latent defect in the property. The seller could not rely on the voetstoots clause in the contract as he knew that the land was defective. The Judge ordered the seller to repay the buyer her money, together with interest as well as her legal fees.

The seller appealed the judgement. The decision in the appeal case was handed down in November and the seller lost the appeal. The court in the appeal case confirmed that a having a voetstoots clause in an agreement of sale, does not provide protection to a seller if they knowingly concealed a defect from a buyer.

There are a number of lessons here for the Property Practitioner (PP):
1. Regulation 34.3.2.1 of the Code of Conduct says as follows:
"An estate agent shall -
34.3.2.1 convey to a purchaser or lessee or a prospective purchaser or lessee of immovable property in respect of which a mandate has been given to him to sell, let, buy or hire, all facts concerning such property as are, or should reasonably in the circumstances be, within his personal knowledge and which are or could be material to a prospective purchaser or lessee thereof;"
2. The Regulation says that the PP must disclose all material facts that are, or should reasonably in the circumstances be within his personal knowledge. Again, this is a question of fact. It would not be sufficient for a PP to use as a defence, that they did not know about something. The question would be, should the PP have known about this? It is your responsibility as a PP to ask the right questions of a seller and obtain accurate information regarding a property and indeed, any circumstances relating to the property that may affect its value.
3. We also need to refer to Section 67 of the Property Practitioners Act 22 of 2019, which deals with the mandatory disclosure form.
4. As a property practitioner, you MUST ensure that you obtain a completed and signed mandatory disclosure form when you take a mandate. The Chuma case happened before the introduction of the Property Practitioners Act.
5. Likewise, you MUST provide a copy of the form to prospective purchasers or lessees.

6. In addition, ENSURE that you attach a copy of the form to the agreement of sale or lease.
7. TAKE NOTE: A completed and signed form is an important protection for you, as a Property Practitioner and will assist you in preventing a purchaser from taking issue with you and trying to claim restitution for defects that were not disclosed, as well as preventing the PPRA from investigating charges of improper conduct or levying a fine against you, for not complying with your obligations.
8. The mandatory disclosure form gives prospective purchasers and lessees a certain degree of peace of mind.
9. The mandatory disclosure form also provides the seller with an opportunity to disclose all defects or known issues in the property, but will still be protected by the voetstoots clause, for any defects that the seller was not aware of. As a property practitioner, you also need to point out that both the seller and buyer, can obtain their own independent, professional advice regarding the condition of the property.

It also goes without saying, that as a Property Practitioner, you need to be very familiar with your farming area. If you hold yourself out to be an area expert, then you need to ensure that you know what is happening in your area. The geographic area where the Chuma case occurred, is well known for sub-surface dolomitic conditions. No one is expecting you as a PP to have geotechnical knowledge, but if you operate in such an area, you would be aware that undeveloped land would require a geotechnical survey by an engineer.

As always, if you are not sure, ask someone who can advise you correctly.

Daphne Chuma v Bondcor (Pty) Ltd, Werner Serfontein and Standard Bank of South Africa Ltd.

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