THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 330/2022

In the matter between:

JAN PIETER LE ROUX

APPELLANT

and

CHRISTIAAN FREDERIK ZIETSMAN **FIRST RESPONDENT**

ESTER PETRONELLA ZIETSMAN **SECOND RESPONDENT**

Neutral citation: *Le Roux v Zietsman and Another* (330/2022) [2023] ZASCA 102 (15 June 2023)

Coram: MOCUMIE, MBATHA and MABINDLA-BOQWANA JJA and KATHREE-SETILOANE and MALI AJJA

Heard: 17 May 2023

Delivered: 15 June 2023

Summary: Law of delict – claim for damages – fraudulent non-disclosure and fraudulent misrepresentation – knowledge of latent defects on a leaking roof of a guesthouse – duty to disclose.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Makgoba JP and Madavha AJ, sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

Mocumie JA (Mbatha and Mabindla-Boqwana JJA and Kathree-Setiloane and Mali AJJA concurring):

[1] A fraudulent non-disclosure in respect of latent defects in a *res vendita* may lead to a successful claim for damages under the *aedilitian* action. The action provides relief for a purchaser who discovers the latent defect(s) known to the seller in the *res vendita* which they fraudulently failed to disclose before the sale of the property to induce the purchaser to conclude the sale. To succeed with a claim based on fraudulent misrepresentation, a purchaser must show that (a) a seller (at the time of the sale) was aware of the defect; (b) the seller deliberately (*dolo malo*) failed to disclose the defect to the purchaser; and (c) with the aim to induce the purchaser to conclude the sale.[1] Defects are latent in that they would not have been visible or discoverable upon inspection by the ordinary purchaser.[2]

[2] In July 2011, Mr Christiaan Frederik Zietsman and Mrs Ester Petronella Zietsman (the respondents) bought a guesthouse situated in Tzaneen, Limpopo from the appellant, Mr Jan Pieter Le Roux. Mr Zietsman (the first respondent) paid R1 300 000 for the guesthouse, to make his wife's dream of running a guesthouse a reality. The property was transferred into their names on 30 September 2011, and they took occupation on 11 July 2011. Barely three months after they had taken occupation of the property, it rained heavily. There was extensive leaking of the entire roof. The guesthouse was flooded with water. And the furniture and linen were

[1] *Van der Merwe v Meades* [1991] 4 All SA 42 (AD); 1991 (2) SA 1 (AD) at 8.
[2] *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Limited* [1977] 4 All SA 94 (A); 1977 (3) SA 670 (A) at 683H-684C.

soddened. As their funds were exhausted from purchasing the guesthouse, the respondents were compelled to seek extra funding in the amount of R241 281.76 to repair the roof. To add to their woes, for the two months the guesthouse was under repair, they could not conduct any business. As a result, they lost the income which would have been generated during that period.

[3] Consequently, the respondents sued the appellant in the Regional Court of Limpopo, Tzaneen (the regional court) for damages in the amount of R241 281.76 (for the first claim, based on fraudulent non-disclosure) and for R102 725.04 (for the second claim, based on loss of income). Their claims were founded on the delictual liability of the appellant, and not on the implied warranty of a seller that the *merx* is free of latent defects. Therefore, the voetstoots clause in the deed of sale (which the appellant initially relied upon but subsequently abandoned) was inapplicable. The trial proceeded on the merits of the claim before one magistrate and the quantum served before another.

[4] The respondents testified in support of their case. They also called the estate agent, Ms Iris Thornhill, to testify on their behalf and an expert witness, Mr Dirk Rosslee, a civil engineer. The appellant testified in his case and called no expert witness. At the conclusion of the trial, the regional court found in favour of the respondents. And declared that the appellant was liable to pay for the damages in the amount of R167 480.23 for the repairs of the property and an amount of R68 038.00 in respect of the loss of income, resulting from the fraudulent non-disclosure and fraudulent misrepresentation which the respondents had proven. It also directed the appellant to pay the costs, including costs of counsel (on the regional court scale) and the fees of the expert witness.

[5] The respondents' pleaded case was that the appellant was aware of the defects in the roof, that he had a duty to disclose the defects to them, but he failed to do so. They averred that this was a fraudulent non-disclosure, alternatively a fraudulent misrepresentation on the part of the appellant. Furthermore, they averred that the appellant was aware that they intended to use the property for purposes of conducting the business of a guesthouse; that it was impossible to sustain that business without repairing the defective roof; that he was aware of their costs to

diagnose and repair the roof; and that the respondents were unable to conduct the said business as a result of the defect and the repairs for a period of two months. They also pleaded that the appellant had represented to them that the leaking of the roof 'had been repaired and attended to and would accordingly no longer occur'. And that the appellant did not disclose that the leaking might recur.

[6] In his plea (after abandoning four special pleas), the appellant denied that he fraudulently did not disclose or misrepresented to the respondents that the roof leaked. He alleged that the roof leak was disclosed to the respondents. And further that the respondents were precluded from claiming damages because the deed of sale contained a voetstoots clause (clause 6.3). The appellant denied that it would not have been possible to sustain the business of a guesthouse with a defective roof. He denied that the repairs to the roof were necessary; as well as the quantum of the repairs; that the respondents were unable to conduct the business because of the defect and the repairs for a period of two months; and, that they consequently, suffered loss of income.

[7] Aggrieved by the decision of the regional court, the appellant appealed to the Limpopo Division of the High Court, Polokwane (the high court). The high court (per Makgoba JP, with Madavha AJ concurring) dismissed the appeal with costs and confirmed the order of the regional court. Dissatisfied with the outcome of the appeal, the appellant successfully lodged a petition to this Court.

[8] Before this Court, the issues were narrowed down to one crisp issue: 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.

[9] Briefly, the evidence was that, before the sale, the appellant showed the house to the respondents and Ms Thornhill, the estate agent who introduced the respondents to the appellant. On the first visit, the respondents (in particular, the second respondent) and Ms Thornhill noticed water stains on the ceiling of bedroom 6 and 7 and on the wall of one of the bathrooms in room 7. The appellant told them

that room 7 had had a leak as well as the bathroom. He assured them that the leaks had been fixed by a handyman he used from time to time to do repairs and maintenance of the property in issue and another property that he ran as a guesthouse.

[10] In her testimony, the second respondent said that prior to the signing of the deed of sale she had viewed the property with Ms Thornhill and her husband, although her husband was not always with them inside the house. As they moved through the house, the appellant repeatedly said, ‘the roof leaked but that it had been repaired and did not leak anymore’. When the first rains fell, a few months after they took occupation, the roof leaked badly. All the rooms were affected, the bedding and luggage were soaked, floors were wet, the furniture was damaged, and guests had to be moved. Initially, as they did not have money to repair the roof, they coped as best as they could. Every time it rained the roof leaked. The first respondent finally obtained a loan. The repair work of the roof commenced in March 2014. The second respondent testified that had she been aware of the condition of the roof, she would never have bought the property.

[11] The second respondent further testified that after the sale and the respondents taking occupation, she informed the appellant (who spoke to her on some occasions) about the leaking roof, but he insisted that the roof had been repaired.

[12] The first respondent confirmed the evidence of the second respondent in material respects. He too confirmed that just after the first rains, there was serious leaking of the roof, furniture and carpets were damaged and guests complained. Ms Thornhill confirmed that the appellant had given her and the second respondent the assurance that the roof had been repaired and no longer leaked. After the first rains, the second respondent contacted her and then she went to see the damage in person. And she saw that the property was ‘underwater’.

[13] In his evidence, the expert witness, Mr Rosslee, testified that when inspecting the roof, he discovered the cause of the leaking roof to have been underlying structural defects. His investigations on site revealed two major problems, namely, (i)

the inferior design and (ii) inferior workmanship. He noted these in a written report, which was admitted as an exhibit before the regional court. Under the heading 'Inferior Design' he stated that 'the entire roof speaks of negligent design, inferior workmanship and bad maintenance'. Regarding the heading 'Inferior workmanship', he noted that 'it is evident that [the builder] of the roof was not a skilled artisan'. His conclusion was that 'the roof under investigation was prone to leak from the day that it was built.' He noted that there was also evidence which showed that efforts were made to seal off leaks in the past, especially on the ridge of the roof. As proof of this, during the investigation, he observed a new cracked ridge tile. He opined that it was clear that the problem had escalated over time, because there was evidence of many tiles which were damaged by workers during maintenance efforts and the repainting of the roof. He concluded by stating that 'any claim by the previous owner that no problems with roof leak were experienced in the past [would] simply be impossible and untruthful'. The appellant did not lead any expert evidence to rebut this evidence.

[14] The appellant, in his evidence, denied that the leaking roof had been a problem for a long time or at least at the time that he had been in occupation; some five years prior to the sale of the house. According to him, only room 7 leaked. He maintained that the roof had been fixed by his handyman who did repairs and maintenance at this property and the other property where he ran a guesthouse. On the advice of the handyman, he had bought a plastic sheeting which was used to seal the ceiling of room 6 and the pipe that was leaking in the wall of room 7. As a result, he personally did not experience any leaking in the house thereafter. The handyman did not give him any assurance that the leaking would not recur. When the second respondent asked him if the roof would leak again, his words to her and Ms Thornhill were, 'I do not believe the roof will leak again'. He testified that he also trusted that it would not leak. And six months after the sale, there was minimal rain. And therefore, no opportunity to see whether the roof leaked.

[15] The trial court analysed the evidence and concluded that the evidence of the respondents and their witnesses were credible and had to be accepted. It rejected the aspects of the evidence of the appellant that conflicted with that of the

respondents. There is no reason to interfere with the factual findings of the trial court. On the contrary, they were fully justified by the record.

[16] On appeal, the high court evaluated the evidence on record. It went a step further by addressing the defence of the voetstoots clause, which the appellant had raised but the trial court had not addressed at all. In its analysis, the high court showed an appreciation of the trite principle that it was bound by the credibility findings of the trial court. It stated the following:

'Taking into consideration the conspectus of [all] the evidence on record and the credibility of all the witnesses in this matter, it is accepted as a fact that with the first rains of September/October 2011, all the rooms of the property leaked. . . Once it is accepted that all the rooms leaked, it becomes inconceivable that the condition of the roof as alleged by the [appellant] could have deteriorated so dramatically in a period of three months. . . The [evidence of the respondents] is strongly corroborated by the objective evidence of the engineer, Mr Rosslee. The [appellant's] version is irreconcilable with Mr Rosslee's evidence that there were numerous places where rainwater had direct access to the ceiling below, as a result of longstanding defects in the roof construction. Of particular importance in Mr Rosslee's report is paragraph 6 wherein it is stated:

"Any claim by the previous owner that no problems with the roof leaks were experienced in the past, would simply be impossible and untruthful.".'

[17] The high court also held that, 'the inference that the [appellant] was aware of the defects is consistent with all the proven facts. The inference drawn is the most plausible because in the light of the engineer's report and the extensive and long-standing defects in the roof, it is very difficult to believe that the [appellant] could not have been aware of the seriousness of the leakage problems. Furthermore, the roof could not possibly have deteriorated from the condition which the [appellant] alleged in evidence, namely that only room 7 leaked to its actual condition three months later, when all the rooms leaked. It is noteworthy that the [appellant] admitted to a spot on the ceiling of room 7 but used plastic sheeting/membrane larger than a double garage to address it. This surely indicated knowledge of a leak far more extensive than what he admitted'.

[18] The high court finally concluded that '[t]aking into consideration the circumstances in which the [appellant] failed to disclose the true extent of the

leakage of the roof and the defects in the roof, I come to the conclusion that the information had been withheld to secure the sale and to benefit the [appellant]'.

[19] I have extensively quoted the findings of the high court above, to show the proven facts from which the high court and the regional court drew their inferences, to conclude that the respondents had objectively proven the causal link between the false representations and non-disclosures and the conclusion of the sale.[3] These facts and inferences include the following. First, the engineer's report revealed extensive and long-standing defects in the roof which (defects) contradict the appellant's claim that he was not aware of the seriousness of the leakage problems. Second, the roof could not possibly have deteriorated from the repair of the roof claimed by the appellant to its leaking condition barely three months later, when all the rooms leaked. Third, the evidence of the appellant is irreconcilable with Mr Rosslee's evidence that there were numerous places where rainwater directly leaked through the ceiling because of longstanding defects in the roof construction. Fourth, the appellant admitted to the presence of a water damp spot on the ceiling of bedroom 7, yet used plastic sheeting/membrane much larger than this area to address it. It is reasonable to draw an inference from this that the appellant had knowledge of far more extensive water leakage than what he admitted. Fifth, Mr Rosslee's expert evidence that the leakage problems of the roof were so stark that if anyone claimed that there had been no problem of leaking before the respondents complained, they were being untruthful. And importantly, sixth, the recent/fresh crack which Mr Rosslee found when he did his investigation shortly after the rains, was telling.

[20] The appellant had a duty to disclose the latent defects in the entire roof. The high-water mark of his case was that Mr Rosslee was an expert on structural defects. Thus, it was unfair to expect him to know about the defects in the roof in the same way as Mr Rosslee, who is an expert, while he and the handyman were laypersons. According to the appellant, if the respondents also did not know and could not see the structural defects with their naked eyes until they were shown the photographs of the roof, this was sufficient not to impute knowledge of the latent

[3] *Glaston House (Pty) Ltd v Inag (Pty) Ltd* [1977] 3 All SA 88 (A); 1977 (2) SA 846 (A); *Trotman and Another v Edwick* 1951 (1) SA 443 (AD).

defects in the roof to him. It is inconceivable that the appellant may not have been aware of the nature of the structural defects as the cause of the leak in the entire roof. Even as a layman, he would have noticed the leaking roof for the five years he had been in occupation of the property, for the reasons given by Mr Rosslee.

[21] On his own version, the appellant had no true belief at the time of the signing of the deed of sale that the leaking roof had been fixed.[4] As demonstrated by Mr Rosslee, to put only a plastic sheeting/membrane in the ceiling was a temporary measure which could not withstand rains, more so heavy rains. This was not disclosed to the respondents. It is simply disingenuous for the appellant who had been in occupation for five years, to say that he was not aware of the defects. The plastic sheeting/membrane (of the size of a double garage) did not cover the ceiling of bedroom 7 only, but the other rooms too. This means that the handyman would have worked on the other rooms as well. It is reasonable to infer from this that the plastic sheeting was meant to cover leaks in those rooms as well. In any event, the appellant led no evidence to rebut the evidence of Mr Rosslee. His say-so that he and the handyman were both laypersons, as opposed to Mr Rosslee (an expert in structural defects), is no excuse, in the light of the evidence presented.

[22] On the established evidence, the appellant fraudulently misrepresented the true condition of the roof and failed to disclose this to the respondents, as that would have clearly played a crucial role in the respondents' decision of whether to acquire the property or not. On the probabilities, the only reasonable inference to be drawn, as correctly concluded by both the high court and the regional court, is that the non-disclosures and misrepresentation were made deliberately in order to induce the sale of the guesthouse, and this constituted fraud.[5] Therefore, the high court's dismissal of the appeal cannot be faulted. For these reasons, the appeal must fail.

[23] In the result, the following order is issued:
The appeal is dismissed with costs.

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[4]See *Banda and Another v Van der Spuy and Another* [2013] ZASCA 23; 2013 (4) SA 77 (SCA) para 22.
[5]See *Rossouw v Hanekom* [2018] ZASCA 134 (SCA).

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B C MOCUMIE

JUDGE OF APPEAL

Appearances

For the appellant:	F J Labuschagne and S B Nel
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