IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. AR27/13

In the matter between:

BARBARA JOY HAVISIDE Appellant

and

MORNE HEYDRICKS First Respondent
JANE HEYDRICKS Second Respondent

APPEAL JUDGMENT delivered on 17 October 2013

STRETCH AJ:

[1] On 15 August 2005 the parties concluded a written sale agreement in terms of which the respondents bought immovable residential premises (the property) at Port Shepstone from the appellant for R896 400,00.

[2] Subsequent to having taken transfer, the first respondent approached the local municipality because he and the second respondent wanted to build a flat on top of the existing double garage and outbuildings.

[3] Upon inspection of the municipality's files the first respondent discovered that:

[3.1] A letter dated 26 June 1991 had been drafted by the municipality ostensibly for the appellant's attention, stating that it had come to the attention of the municipality that an illegal structure (which was presumably a carport) was in the process of being built on the property in the absence of plans having been submitted to the local engineer's department for approval.

[3.2] The file did not contain any plans for the existing double garage which formed part of the property which the respondents had bought.

[3.3] Subsequent to consultations with an architect and a civil engineer, it was confirmed that not only were there no building plans for the double garage, but also that the structure which had been erected did not meet the usual standards in terms of building regulations. The architect quoted R2 250,00 to draft proper plans to remedy the situation.

[4] In his evidence in the magistrates' court, the first responded admitted that:

[4.1] he did not obtain a copy of the title deeds before buying the property;

[4.2] he did not approach the municipality to inspect the building plans before buying the property;

[4.2] he and the second respondent had assumed that everything was in order.

[5] The architect who had furnished the respondents with the aforesaid

quotation admitted that even if valid foundations were in place with respect to the double garage, it could not be assumed that such foundations would be strong enough to sustain a second storey above the double garage.

[6] A civil engineer confirmed, in respect of the double garage, that:

[6.1] the foundations were inadequate;

[6.2] the external walls consisted of a single instead of a double layer of bricks and these walls were not binded in;

[6.3] the roof pitch was not sufficiently slanted;

[6.4] there was no lining underneath the roof.

[7] In a nutshell the double garage was an illegal structure which did not conform to municipal bylaws.

[8] It was not disputed that it would cost the respondents in the region of R91 512,00 to obtain plans and to demolish and reconstruct the double garage in accordance with the bylaws and building practices; alternatively that this amount (being the quantum of the respondents claim against the appellant in the action instituted in the magistrates' court) represented the diminished value of the property.

[9] The appellant testified that:

[9.1] When she bought the property (as a first time home owner) from an

employee of the municipality during 1991, there was already a carport in existence.

[9.2] At all material times thereafter the property was occupied by her mother and she only visited there once a year.

[9.3] After she had purchased the property, her mother and her brother filled in the walls of the existing carport without her knowledge or consent. When she visited at Christmas time, it was already a *fait accompli.* She did not deem it necessary to ask her family whether they had obtained permission to do this or whether they had submitted plans, because she was not interested in the maintenance of this house which she had bought for her mother to occupy, and that she accordingly left these issues to her brother. When she saw that the walls had been erected, it did not occur to her that she should ascertain whether this had been done in accordance with accepted building standards.

[9.4] It was her mother's decision to sell the house and her mother approached agents to do so with her consent.

[9.5] She did not discuss the selling price with the agents. All she wanted was to sell for a "market-related" price.

[9.6] She did not speak to the respondents before they took transfer of the property.

[10] The trial magistrate held that the issues for determination were the following:

[10.1] Whether, at the time that the sale was concluded, there was an

obligation on the appellant to disclose to the respondents that the double garage was an “illegal structure”.

[10.2] Whether the appellant fraudulently, and with the intent to induce the respondents to buy the property for “R830 000,00” had failed to disclose to the respondents that the double garage was an “illegal structure”.

[10.3] Whether it was an implied; alternatively, a tacit term of the sale agreement that improvements on the property had been erected lawfully, and/or that building plans had been approved in writing as contemplated in terms of the National Building Regulations and Standards Act 103 of 1997 (the Act) prior to the erection of structures, and/or that building plans had been approved by the local council, and/ or that the respondents were entitled in law to use improvements which they had paid for to their “full extent.”

[11] The magistrate found that:

[11.1] There was a duty on the appellant to enquire whether plans had been obtained for the double garage and to inform the respondents that it was an illegal structure.

[11.2] It could be inferred that she did not make such disclosure because she wanted a higher price for the property.

[11.3] The appellant’s silence in this regard fell within the ambit of non-disclosure which is similar in many respects to misrepresentation inducing the respondents to buy the property.

[11.4] It was an implied term in the contract that this structure had been erected in compliance with the Act and/or with the municipality’s approval. In this regard the magistrate relied for authority on the judgment in ***Van Nieuwkerk*** *v*

McCrae 2007 (5) SA 21 WLD and also to support his finding that the appellant was barred from relying on the usual *voetstoots* clause contained in the sale agreement.

[11.5] The respondents were accordingly entitled to judgment on the merits which the magistrate granted.

[12] The appellant appeals against this judgment on the grounds that the magistrate erred in:

[12.1] concluding that it was not necessary to make a finding on whether the appellant's non-disclosure was fraudulent, and that a mere finding of non-disclosure was sufficient for the appellant to attract liability;

[12.2] not concluding that a finding of fraudulent misrepresentation required knowledge of unlawfulness (which the appellant did not have);

[12.3] not following the judgment in ***Odendaal v Ferraris 2009 (4) SA 313 SCA,*** which judgment was given on 1 September 2008, a month before the magistrate delivered his judgment in the court *a quo;*

[12.4] finding in the respondents' favour in the face of their failure to have proved that the appellant had deliberately concealed the existence of latent defects with the intention to defraud.

[13] On the other hand, it is contended on behalf of the respondents that the issue which I have to determine rests on a crisp legal point (that the trial court correctly determined that it was an implied term of the agreement that structures had been erected in compliance with building regulations and with the approval of the municipality), and not on the factual question of whether or not the

appellant had knowledge of the illegality of the structure at the time that the sale was concluded.

[14] In support of this contention, the respondents rely on the judgment of Corbett AJA in ***Alfred McAlpine & Sons (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506A at 531D-H*** where it is also stated that a term is not normally implied if it is in conflict with the express provisions of the contract, and that an implied term simply represents a legal duty, imposed by law, unless excluded by the parties.

[15] It is further contended on the respondents' behalf that the appeal against the magistrate's failure to uphold the *voetstoots* clause in the contract is misplaced and founded on a mistaken interpretation that the "illegality" in the construction of the garage amounts to a latent defect excluded by the *voetstoots* clause, when in reality the illegality applies "to the lack of certain qualities or characteristics which the parties have agreed the *merx s*hould have", and as such are not excluded by the *voetstoots* clause (see ***Ornelas v Andrew's Café and Another 1980 (1) SA 378 W at 388G-390C; Van Nieuwkerk v McCrae (supra) at 21B*****).**

[16] The respondents further contend that insofar as reliance is placed by the appellant on the judgment in ***Odendaal (supra)*****,** the facts of that case are distinguishable from the those before me in that in the matter before me the *merx* was not fit for the purpose for which it was intended and that it could not be used on account of the fact that it was an "unsafe" structure and had to be demolished.

[17] I am not inclined to agree with this contention. The evidence which was

presented at the trial was not that the garage was not fit for the purpose for which it was intended (which would in my view, and in the absence of evidence to the contrary be to park a vehicle or vehicles). On the contrary, it appears that the structure had been holding up for some 14 years before the respondents decided that they wanted to build another structure on top of it. Indeed, the evidence of the architect was that a foundation which would be suitable for a single storey structure may not be suitable for a double storey structure, implying that foundational changes would have to be effected in any event.

[18] However, that is not the end of the matter. In my view, a proper interpretation of what was intended to be conveyed in ***Odendaal*** and a common-sense application of the ***Odendaal*** judgment to the facts before me on appeal, must of necessity require an analysis of the facts of that case and the other cases referred to both in that judgment and in argument before me.

[19] In ***Odendaal*** there was found to have been non- compliance with the Act in that previously rejected buildings plans had not been approved in terms of the Port Elizabeth Municipality Zoning Scheme Regulations, and that the garage had not complied with the regulations in that it did not have a firewall or a fire door. These were referred to as latent defects inviting a counter argument that the seller was protected in this regard by the *voetstoots* clause in the contract. On the other hand, it was argued by the buyer that the seller had concealed these defects from him and that he was thus entitled to rely on the *aedilitian r*emedies available to him. The seller admitted most of the defects but denied wilfully concealing them.

[20] In ***Odendaal***, as in the matter before me, it was not clear whether the High Court (having been the court *a quo* in that case) had found that the seller had wilfully concealed the defects. The Court's reasoning also did not traverse the

effect of the *voetstoots* clause, which had excluded liability for both latent and patent defects as in the case before me.

[21] On appeal the buyer relied on a new point of law – that the *voetstoots* clause did not protect the seller from her failure to obtain statutory approval for the construction of the carport and the outbuilding (as is likewise contended in the matter before me).

[22] In support of this submission the buyer relied (as do the respondents before me) on the decision in the ***Van Nieuwkerk*** matter where Goldblatt J held that a seller in those circumstances could not rely on the *voetstoots c*lause since it excluded liability only for latent defects of a physical nature and did not apply 'to the lack of certain qualities or characteristics which the parties agreed the *merx* should have' - which included, he held, statutory compliance. For this conclusion he found support in the ***Ornelas*** matter, where a property was sold as a going concern for the purpose of conducting a café and a restaurant business. After the sale the buyers became aware that the restaurant was being conducted without a licence, and they were unable to obtain one to operate it. They cancelled the sale, contending that the seller's failure to deliver a property from where the envisaged business could lawfully be conducted was a material breach of an implied term.

[23] The sellers sought refuge in the *voetstoots* clause, but Nestadt J rejected this argument holding that the clause did not exempt the sellers from their obligation to deliver a business which could be conducted lawfully, and thus this was not a case of a defect in the *res vendita* but in truth, a case of delivery to the buyers 'of something different from what was bought' (at 389D).

[24] It is clear that the ***Ornelas*** matter is quite distinct from ***Van Nieuwkerk*** as well as from ***Odendaa***l and the case before me. The absence of a licence to operate premises as a restaurant simply meant that the buyers could not use it for the express purpose for which it had been purchased. By contrast, the absence of statutory approval for building alterations, or other authorisations which render a property compliant with prescribed building standards, such as were in issue in ***Van Nieuwkerk*** and in ***Odendaal,*** and in my view are in issue here, do not necessarily render the property unfit for habitation

[25] It is true that the structure in the matter before me was not authorised. But, as will appear from the discussion below, and as was similarly discussed in ***Odendaal***, the absence of statutory permission necessary to render them authorised are defects to which the *voetstoots* clause in any event applies. This case in my view is therefore distinguishable from ***Ornelas***, which in any event does not support the reasoning or conclusion reached in both ***Van Nieuwkerk*** and in ***Odendaal.***

[26] As to the nature of a defect which would fall within the ambit of a *voetstoots* clause, it has for example been held that in relation to the sale of land as it stands, the language is wide enough to cover not only any hidden defects in the property itself, but also any defect in the title to, or area of the property (see ***Uhlmann v Grindley-Ferris 1947 (2) SA 459 (C) at 462).***

[27] I agree with the learned Judge in ***Odendaal,*** that by this token the defect in ***Ornelas*** (that the building on the property could not be licenced for business purposes) might indeed be argued to fall into this category (***at 321D***).

[28] Similarly, in ***Glaston House (Pty) Ltd 1977 (2) SA 846 (A)*** a broad view

was also taken of what constituted a latent defect. There the court held that the existence of a valuable sculpture which had been embedded in a dilapidated building and precluded the re-development for which the property had been bought, was a latent defect (***at 866F***).

[29] The position with respect to latent defects was summed up by Corbett JA in ***Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd 1977 (3) 670 (A) at 683H-684A***, where the following was stated:

'Broadly speaking in this context a defect may be described as an abnormal quality or attribute which destroys or substantially impairs the utility of effectiveness of the *res vendita,* for the purpose for which it has been sold or for which it is commonly used … Such a defect is latent when it is one which is not visible or discoverable upon an inspection of the *res vendita*.'

[30] The first part of this *dictum* was re-affirmed in ***Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander 2002 (2) SA 447 (SCA).***

[31] In my view, therefore, the absence of statutory approval such as is at issue here, and was also at issue in both ***Van Nieuwkerk*** and in ***Odendaal,*** constitutes a latent defect.

[32] In ***Odendaal***, Cachalia JA held that the carport's irregular structure *which may require either its demolition or alteration as a condition for approval* (my emphasis), are defects which interfere with the ordinary use of the property – thus satisfying the Holmdene Brickworks test – and are therefore latent defects within the *aedilitian* concept. The Judge held further that the fact that they also contravened building regulations did not change their character and disagreed

with the finding in ***Van Nieuwkerk*** to the extent that that case suggested otherwise. The Judge accordingly concluded that a *voetstoots* clause ordinarily covers the absence of statutory authorisations ***(at 322C-E)***. I respectfully agree.

[33] After all, the purpose of such a clause is to exempt the seller from liability for defects of which he or she is unaware. And where the seller's statutory non-compliance concerns latent defects in the property, as was the case in ***Odendaal*** and also in the matter before me, the seller ought to be entitled to invoke the exemption.

[34] For the sake of completeness, the *voetstoots* clause in the contract before me reads as follows:

"7.1 The property is sold:

7.1.1 *voetstoots* and as it stands, with all defects whether latent or patent,

7.1.2 subject to all the conditions, burdens and servitudes referred to in, and/or registered against the Title Deeds of the property and to all such conditions, burdens and servitudes which may exist in regard thereto.

7.2 The PURCHASER is deemed to be fully acquainted with the property nature, its conditions, beacons, extent and locality, the SELLER and the SELLER'S agents being entirely free from liability in respect thereof."

[35] The matter still does not end here. It is trite that if a purchaser wants to avoid the consequences of a *voetstoots* sale*,* the *onus* is on him to show two things:

[35.1] that the seller knew of the latent defect and did not disclose it;

[35.2] that the seller deliberately concealed it with the intention to defraud.

[36] The *locus classicus* in this regard is ***Van der Merwe v Meades 1991 (2) SA 1 (A) at 8E-F.***

[37] There is nothing before me to suggest that the appellant was aware that the garage had contravened building regulations. On the contrary, the relevant portion of her evidence reads thus:

'Question: Did you have any knowledge or any concept that there was an illegal structure on the property?
Answer: No.
Question: And did you have any idea that there was an illegal structure on the property when you bought the property?
Answer: No.
Question: When you visited the house and you saw that the walls – there had been walls put in between the pillars of this, now we've found out, illegal structure, did it occur to you that you should in fact find out whether it was according to building standards?
Answer: No.'

[38] Objectively speaking, with respect to the last two answers, and insofar as the suggestion has been that there was already an illegal structure on the property when the appellant bought it in good faith from her successor in title 14 years previously, I see no reason why she, herself having bought the property from an employee of the municipality without any problems, should or would have had any cause to contemplate that the original carport may have been an illegal structure.

[39] In the premises there is nothing before me to suggest that the seller was aware that building regulations had not been complied with. Even if she was aware, there is nothing to suggest that she ought to have considered the matter significant enough to mention to the buyer. In any event, the respondents' case in the trial court failed to establish the test set forth in ***Van der Merwe v Meades*** (that the appellant deliberately concealed the fact that building regulations had not been complied with, from the respondents in order to induce the sale of the property at an inflated price).

[40] The magistrate in the court below was of the view that it was not incumbent upon him to address the issue of whether the non-disclosure was fraudulent or otherwise. It is clear from the *dictum* in ***Van der Merwe v Meades*** that in order for a buyer to escape the consequences of a *voetstoots c*lause it is incumbent on him to establish fraud on the part of the seller.

[41] In my view the magistrate erred in not addressing that issue and making a finding in that regard. Having said that, I am inclined to believe that had the magistrate addressed this question he would have been constrained to conclude that fraud had not been proved.

[42] All of this is of course succinctly set forth in the the Supreme Court of Appeal's most recent judgment on these issues in the ***Odendaal*** matter. I agree with appellant's representatives, that the magistrate erred in not following that decision when he gave his judgment.

[43] In the premises I am of the view that the appellant was sufficiently protected by the *voetstoots* clause in the contract of sale, to successfully escape any liability with respect to latent or patent defects.

[44] It follows that the appeal must succeed.

I propose an order in the following terms:

ORDER:

1. **The appeal is upheld with costs.**

2. **The order of the court below is set aside.**

3. **In its place there is substituted the following order:**

‘The plaintiffs’ claim is dismissed with costs.’

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CHILI AJ

I agree and it is so ordered:

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STRETCH AJ

Appearances/..

Appearances /:

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Date of Hearing	**:**	20 May 2013
Judgment delivered on	**:**	17 October 2013