THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 422/07

In the matter between: Precedential significance

TALITA ODENDAAL **APPELLANT**

v

PATRICK KEVIN FERRARIS **RESPONDENT**

Neutral citation: *Odendaal v Ferraris* (422/2007) [2008] ZASCA 85 (1 September 2008)

Coram: Mpati P, Cameron JA, Navsa JA, Cachalia JA et Leach AJA

Heard: 9 May 2008
Delivered: 1 September 2008
Corrected: 4 September 2008

Summary: In a sale of property, the seller's failure to obtain statutory approval for building alterations on the property constitutes a latent defect in the property – where a seller does not wilfully conceal such a latent defect he is entitled to rely on the provisions of a *voetstoots* clause against a buyer who seeks to invoke the aedilitian remedies against him, except where the absence of statutory authorisation renders the property unfit for the purpose for which it was bought and sold.

ORDER

On appeal from: High Court, Port Elizabeth (Miller J sitting as court of first instance).

(1) The appeal is upheld with costs including the costs of two counsel;

(2) The order of the court below is set aside;

(3) In its place there is substituted the following order:

(a) The application succeeds with costs, including the costs of two counsel.

(b) The respondent is ordered to vacate the property on or before 30 November 2008.

JUDGMENT

CACHALIA JA (MPATI P, CAMERON JA, NAVSA JA et LEACH AJA concurring)

[1] This is an appeal against the refusal by the high court sitting in Port Elizabeth (Miller J) to grant an application for the respondent's eviction from a residential property at Sunridge Park, Port Elizabeth. The appellant, Ms Talita Odendaal, who owns the property, appeals with leave of that court.

The Factual Background

[2] Early in 2006 the appellant appointed an estate agent to advertise her property for sale. The house on the property (which measures over 2000 square metres) has, among its features, five bedrooms, a double garage, a carport and an outbuilding, comprising both a laundry and servant's quarters. There is also a swimming pool and a jacuzzi.

[3] On 19 March 2006 the respondent, Mr Patrick Ferraris, inspected

the property in the presence of the appellant's estate agent, Ms Dossie Nortjie. He was looking to buy a large family house near to the local primary school his children attended. In addition to its proximity to the school and its spaciousness, the particular feature that appealed to him was ample undercover and uncovered parking; as a collector of classic motor vehicles he found the parking facilities were ideal.

[4] The respondent was not able to gain access to the outbuilding during the inspection because it was locked. However, the estate agent, he says in his answering affidavit (which, according to the well-known test, must form the basis for our factual findings), assured him that the buildings were in a faultless condition, that the jacuzzi worked and that the pool had been inspected for leaks. On these assurances he decided on the same day to sign a written offer to buy the property for R 2,2 million. The appellant accepted his offer. It was a condition of the agreement that resulted that he would, by 5 April 2006, secure a bank loan to cover the full amount and provide a bank guarantee for payment on registration of transfer, secured by a first mortgage bond to be registered on transfer. He secured the loan in good time and occupied the property, as agreed, on 30 June 2006.

[5] On the evening he moved in, the staircase railing collapsed, narrowly missing his daughter and destroying a yellowwood side table. He discovered that the railing was not secured, but during his inspection it had been covered with animal skins thus concealing the defect.

[6] A few days later his family gained access to the outbuilding. They discovered that the ceiling had 'considerable water damage and had partially collapsed and will have to be completely replaced'. There was

also a sewer manhole cover in the middle of the laundry. He avers that the appellant and her estate agent 'deliberately concealed' these defects from prospective buyers.

[7] On 7 July 2006, a week after occupying the property, the respondent visited the municipality to satisfy himself that the buildings conformed to statutory requirements. Mr Peet Vosloo, the building control officer, told him that the appellant's predecessor in title had obtained approval for the outbuilding in March 2000, but only as a storeroom, and subject to the condition that the sewer was re-routed to comply with the municipal town planning regulations. The construction was, however, completed without so complying. He also established that on three previous occasions the municipality had rejected building plans submitted for the carport, which therefore did not comply with s 4 of the National Building Regulations and Building Standards Act 103 of 1977. It transgressed the 1.5 metre building line applicable to property zoned 'Residential 1', without being approved in terms of Municipality Zoning Scheme Regulations.[1] The garage, he also discovered, did not comply with the regulations as it did not have a firewall or fire door.

[8] Having established this, the respondent became concerned that his bond application might be compromised and informed the bank, which advised him to obtain a commitment from the seller to reduce the purchase price as it was reluctant to approve the loan for the full amount in these circumstances. He accordingly instructed the bank to delay the transfer of the property to enable him to resolve the problem.

[9] On 10 July 2006 the respondent wrote to the estate agent drawing

[1] Port Elizabeth Zoning Scheme Regulations promulgated in terms of the Land Use Planning Ordinance 15 of 1985 (C).

her attention to the fact that the municipality had not approved building plans for the outbuilding and carport. (He did not refer to the absence of the firewall and fire door in the garage.) He sought confirmation that these defects would be attended to at the seller's cost. He also intimated that he would instruct the bank:

'To delay, if necessary, the transfer and registration of this property into my name because according to Law, once the property is in my name, the onus rests on me to effect changes which I feel at this time is not my responsibility.'

[10] The following day, Vosloo inspected the property and, having confirmed the illegal structures, issued a notice to this effect. It called on the owner of the property to 'divert the drainage to comply with plan 16006' and to 'submit plans for (the) carport before registration to the new owner take(s) place'. It is not clear on what authority Vosloo relied to order compliance with the building regulations *before* registration, but nothing turns on this.

[11] In the days that followed the respondent discovered a number of further physical defects, which were not apparent at the time of the inspection. He listed these in a schedule of photographs annexed to his affidavit. They included the following:

(a) the jacuzzi was faulty and the swimming pool leaked – despite the estate agent's assurances to the contrary;
(b) the roof over one of the bedrooms leaked; and
(c) the wood panelling in the dining room had borer beetle in it, which caused dust to accumulate on it daily.

[12] On 18 July 2006 the conveyancers who dealt with the transfer received a message from the bank not to register the bond. They promptly informed the appellant's attorneys, who the next day, invoking the agreement's forfeiture clause,[2] wrote to the respondent:

'. . . Our office has today been informed that you have instructed your bank, FNB not to continue with the registration of the bond when this matter is ready at the Deeds Offices within the following ten days. Kindly note that it is not clear to our client what your intentions are and place on record that you either need to elect to cancel the sale agreement alternatively withdraw your instruction to FNB immediately.

Our client, at this stage does not deem it necessary to respond to any of the allegations pertaining to the alleged building deficiencies and reserves her right to do so at a later stage should it become necessary.

We herewith request that you supply us with your election i.e. whether you wish to cancel the sale alternatively that you will withdraw your instruction to FNB within the following seven days. Your instruction to FNB is viewed as a breach of the written agreement and in terms of paragraph 16 of the offer to purchase we herewith give you notice to rectify your breach on/or before 25 July 2006. Should we not receive your election as aforementioned by the close of business on Tuesday, 25 July 2006 our client will accept your instruction to FNB not to register the bond as a repudiation of the agreement and will act in terms of her rights contained in the sale agreement which may include the immediate cancellation of the sale agreement.'

[13] On 25 July 2006 the respondent responded by telephoning the writer to discuss the matter. The latter was, however, not receptive. So the respondent wrote to him later that day stating that the process to

[2] Clause 16, the forfeiture clause, provides:
'DEFAULT. If after acceptance hereof either party fails to fulfil any of the conditions hereof, and remains in default for a period of 7 (seven) days after written notice has been given by the other party or his agents, then the aggrieved party shall be entitled without prejudice to any other right of law, to claim performance or cancellation of this contract and damages. No indulgence which either party may grant to the other shall constitute a waiver of any rights of the grantor.'

determine time frames and costs of getting the property to conform to municipal standards would take time as this involved obtaining plans and quotations. He therefore would not, he wrote, withdraw his instruction to the bank. In reaction, the appellant instructed her attorney to cancel the contract, which he did by letter on 27 July 2006 in these terms:

'. . . We confirm that you have elected not to withdraw your instructions to First National Bank not to continue with the registration of this transfer. Our conveyancing department as well as the bond attorneys acting for First National Bank in Port Elizabeth confirmed that this matter was on prep at the deeds office on Wednesday 25 July 2006 but could not be finalized as a result of your instruction to FNB. We have confirmed with the bond attorneys that this is still the case this morning.

As per our letter of 19 July 2006 we confirm that your refusal to allow registration to take place constitutes a repudiation of the written sale agreement between yourself and Mrs Odendaal dated 19 March 2006 and our client herewith accepts your repudiation and herewith formally cancels the written agreement with immediate effect.

In view of the cancellation of the sale agreement your occupation of our client's property is unlawful and we herewith demand that you vacate the property described as Erf 99 Sunridge Park by no later than Sunday 30 July 2006. Kindly note that we hold instructions to commence eviction proceedings should you fail to vacate the property by the said date. . . .'

[14] The respondent refused to comply with the demand to vacate the property. Instead he instructed his attorneys to address a letter to the appellant in the following terms:

'. . .

5. Our client has not yet finally decided whether he would proceed with the sale at a reduced price, or rescind the sale agreement. He is entitled to be given a reasonable period to obtain quotations to remedy the defects, so that he can arrive at an informed decision what to do. A number of quotations have been

obtained by our client but, as stated in his letter to you dated 25 July 2006, the nature and extent of the defects are such that the process of quantifying the cost of the remedial work will take some time. Our client is going out of his way to speed up the process and hopes to have a full picture within 14 days, whereafter he will advise your client of his decision.

6. We have noted your client's intention to institute eviction proceedings. Needless to say, this will be opposed. Our client will remain in occupation of the premises and shall vacate same only if and when he has taken a decision to rescind the sale agreement. Payment of occupational interest for August, as stipulated in clause 5 of the sale agreement, is hereby tendered on the understanding that our client will be refunded pro rata should he decide to rescind the sale and vacate the property before the end of the month.'

[15] On 8 August 2006 the appellant commenced eviction proceedings against the respondent in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). Five weeks later, on 13 September 2006, the respondent purportedly exercised an election to abide by the contract, though reserving his right to claim damages or, alternatively, a price reduction. The appellant rejected this election and the dispute proceeded to hearing in the high court.

The Proceedings in the high court

[16] In her application, the appellant maintained that the respondent's refusal to withdraw his instruction to the bank not to register the transfer was a breach of the agreement, and his refusal to rectify the breach in the face of her attorneys' demand a repudiation of it. In respect of the latent defects complained of, she maintained that the *voetstoots* clause[3]

[3] Clause 3 of the agreement provides: 'VOETSTOOTS. The PROPERTY is sold to the PURCHASER voetstoots, there being no warranty against defects, latent or patent offered or required.'

protected her. The respondent asserted, on the other hand, that the appellant had concealed the defects from him and, for this reason, could not rely on the clause's protection. The aedilitian remedies, he submitted, were thus available to him – and he enjoyed a reasonable time to elect whether or not to invoke them.[4] The appellant admitted most of the defects but denied wilfully concealing them from the respondent.

[17] It is not clear from its judgment whether the high court found that the appellant wilfully concealed the defects. Nor does the court's reasoning deal with the effect of the *voetstoots* clause, which excludes liability for both latent and patent defects. It nevertheless upheld the respondent's submission that he was entitled to invoke the aedilitian remedies and rejected the appellant's contention that by instructing the bank not to proceed with the transfer, he had repudiated the contract. The learned judge thus concluded that the appellant cancelled the agreement unlawfully and was therefore not entitled to an order evicting the respondent.

[18] In this court, counsel for the respondent relies on a new point of law – that the *voetstoots* clause does not protect the appellant from her failure to obtain statutory approval for the construction of the carport and the outbuilding. He finds support for his submission in the decision of Goldblatt J in *Van Nieuwkerk v McCrae*,[5] where the learned judge held that in a sale of residential property a buyer is entitled to assume that the building on a property was erected in compliance with all statutory requirements and that it could be used to its full extent. The assumption,

[4] These remedies are the *exceptio redhibitoria* and *exceptio quanti minoris*, which respectively, entitle a buyer to tender restitution of the subject matter of the sale in return for the purchase price or to demand a reduction of the purchase price. See generally A J Kerr *The Law of Sale and Lease* 3 ed (2004) Ch 5.
[5] 2007 (5) SA 21 (W).

he said, was so obvious that it was implied as a matter of law in any agreement relating to the sale of property. And so, he concluded, it was an implied term (or at least a tacit term) of such an agreement that alterations to a building that the seller had effected complied with statutory requirements.[6]

[19] Goldblatt J went on to hold that a seller cannot in these circumstances rely on a *voetstoots* clause since it excludes liability only for latent defects of a physical nature but does not apply 'to the lack of certain qualities or characteristics which the parties have agreed the *merx* should have' – which included, he held, statutory compliance.[7] For this conclusion he found support in *Ornelas v Andrew's Café and another*,[8] where a property was sold as a going concern for the purpose of conducting a café and restaurant business. But 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 therefore cancelled the sale, contending that the sellers' failure to deliver a property from which the envisaged business could lawfully be conducted was a material breach of an implied term. The sellers sought refuge in a *voetstoots* clause which provided:

'. . . The purchasers purchase the said business, together with the assets thereof, voetstoots. It is hereby recorded that the sellers have not in any way given to the purchasers, either expressly or impliedly, any warranty as to the turnover of the business, nor have they either expressly or impliedly given to the purchasers any warranty as to the **state or condition of the business**, or as to the quality, state or condition of the stock of the said business or any part thereof. The purchasers further acknowledge that the sellers have not made any representations whatsoever as to the

[6] Ibid p 28D-G.
[7] Ibid p 29B-C.
[8] 1980 (1) SA 378 (W) at 388G-390C.

turnover of the said business, nor have the sellers made any representation whatsoever as to the quality, **state or condition of the said business**, or of the stock of the said business or of any assets thereof.'[9] (Emphasis added)

[20] The court (Nestadt J) construed this clause restrictively, holding that the 'state or condition of the business' should be 'confined to the physical or visible qualities of the business'.[10] It thus held that the clause did not exempt the sellers from their obligation to deliver a business that could lawfully be conducted, that is with a licence – there being an implied warranty to this effect – and thus that 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'.[11]

[21] In my view, *Ornelas's* case is quite distinct from both *Van Nieuwkerk* and the present case. The absence of a licence to operate the premises as a restaurant or eating house meant that the buyers could not use it for the express purpose for which it had been purchased. 'The whole tenor of the agreement', Nestadt J pointed out, was that such a business would 'be conducted at the premises'.[12] The *voetstoots* clause therefore did not 'exempt the sellers from their obligation to deliver a business which includes a restaurant able to be lawfully operated'.[13]

[22] By contrast, the absence of the statutory approvals for building alterations, or the other authorisations that render the property compliant with prescribed building standards, such as were at issue in *Van Nieuwkerk*, and are at issue here, do not render the property unfit for

[9] Ibid p 385D-F.
[10] Ibid p 388G.
[11] Ibid p 389D.
[12] Ibid p 386E-F.
[13] Ibid p 387H.

the purpose for which it was purchased. The respondent does not allege, nor could he, that the permissions relating to the outbuilding and carport render the property unfit for habitation. Nor does he allege that the municipality proposes to enjoin him from living on the property, or that he is incapable of acquiring the permissions necessary to render the alterations compliant with statutory provisions. The appellant did not deliver to him 'something different from what was bought' as in *Ornelas*. On the contrary, he received exactly what he purchased, namely an ideally-located spacious dwelling house with ample parking space.

[23] It is true that the outbuilding and carport were unauthorised. But as will appear from the discussion below, the absence of statutory permissions necessary to render them authorised are defects to which the *voetstoots* clause applies. This case is therefore distinguishable from *Ornelas*, which in my view does not support the reasoning or conclusion reached in *Van Nieuwkerk.*

[24] This conclusion raises the more general question of the nature of the defect that would fall within the scope of a *voetstoots* clause. Its ambit was left open in *Ornelas,*[14] though the court rightly emphasised that the exclusionary scope of a *voetstoots* clause in any particular case must be decided on its own facts.[15] In a broad sense, any imperfection may be described as a defect.[16] Whether the notion of a 'defect' is to be restricted only to physical attributes of the *merx* or to apply more broadly to extraneous factors affecting its use or value has generated discordant judicial and academic opinion.[17] In relation to a *voetstoots* sale of land,

[14] Ibid p 388-388H-389A.
[15] Ibid p 389A.
[16] See generally: 24 *Lawsa* (first reissue) para 48.
[17] See D G John 'Voetstoots Clause and the Meaning of "Defect" ' (1954) 71 *SALJ* p 8-10; B R Bamford 'Aspects of a *Voetstoots* Clause' (1956) 73 *SALJ* p 62-69; G F Lubbe 'Law of Purchase and

for example, that is a sale of land 'as it stands', it has been held that the language is wide enough to cover not only any hidden defect in the property itself, but also any defect in the title to, or area of, the property.[18] The defect in *Ornelas*, that the building on the property could not be licensed for business purposes, might indeed be argued to fall into this category, but I refrain from expressing a view thereon, since as pointed out, the basis of the decision there was that something entirely different was delivered from what had been sold. It was against the background of this critical finding that Nestadt J restricted the application of the *voetstoots* clause in that case to the physical state or condition of the premises.

[25] *Glaston House (Pty) Ltd v Inag (Pty) Ltd*[19] also took a broad view of what constituted a latent defect – there, this court held that existence of a sculpture with its pediment and cornice, which had been declared a national monument, and which was embedded in a dilapidated building, thus precluding the redevelopment for which the property had been bought, was a latent defect.[20] The reason, said the court, was that the sculpture, even though valuable in itself and therefore hardly a physical 'defect', hindered the use to which the property was to be put.[21] It is now settled that any material imperfection preventing or hindering the ordinary or common use of the *res vendita* is an aedilitian defect.[22] In *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*,[23]

Sale-Remedies' (1977) *Annual Survey of South African Law* 123; *Ornelas v Andrew's Café* 1980 (1) SA 378 (W) at 388G-389A; *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 (A) at 866D-H.

[18] F du Bois *Wille's Principles of South African Law* 9 ed (2007) p 892; *Uhlmann v Grindley-Ferris* 1947 (2) SA 459 (C) at 462; *Voet, 21.1.1* suggests that a servitude over land is a latent defect, although De Wet en Yeats, *Kontraktereg en Handelsreg* 4 ed (1978) p 292, note 97 takes the opposite view.

[19] 1977 (2) SA 846 (A).

[20] Ibid p 866F.

[21] See A J Kerr *The Law of Sale and Lease* 3 ed (2004) p 120.

[22] Ibid.

[23] 1977 (3) SA 670 (A) 683H-684A. The first part of the dictum was reaffirmed in *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd and another* 2002 (2) SA 447 (SCA) at 465J.

Corbett JA put it this way:

‘Broadly speaking in this context a defect may be described as an abnormal quality or attribute which destroys or substantially impairs the utility or 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.*’

[26] In my view, therefore, the absence of statutory approval such as is at issue here, and was at issue in *Van Nieuwkerk,* constitutes a latent defect. The lack of permission in respect of both the manhole over the sewer, which the respondent concedes in his answering affidavit is a latent defect, and the carport’s irregular structure, which may require either its demolition or alteration as a condition for approval, 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 fact that they also contravene building regulations does not change their character. To the extent that *Van Nieuwkerk* suggests otherwise I respectfully disagree with it. So, barring the supervention of public policy considerations, or of illegalities impacting on constitutional prescripts – and none were alleged here – a *voetstoots* clause ordinarily covers the absence of statutory authorisations.

[27] Goldblatt J’s implied term warranting statutory compliance is apparently no more than a reiteration of the rule that the seller of a *merx* warrants that it is free of latent defects. It is not, as counsel for the respondent sought to suggest, an additional term, which exists side by side with and supplements the latter warranty. The whole purpose of a *voetstoots* clause, the contracting parties agree, is to exempt the seller

from liability for defects of which he or she is not aware. And where a seller's statutory non-compliance concerns latent defects in the property, as in this case, the seller ought to be entitled to invoke the exemption. The appellant's belated reliance on *Van Nieuwkerk* to escape its consequences is therefore misplaced.

[28] On this basis, subject to a closer examination of the further facts, the issue thus remains whether the *voetstoots* clause,[24] which otherwise appears to cover all the physical defects of which the respondent complains, including the outbuilding and carport, protects the appellant.

[29] It is trite that if a buyer hopes to avoid the consequences of a *voetstoots* sale, he must show not only that the seller knew of the latent defect and did not disclose it, but also that he or she deliberately concealed it with the intention to defraud (*dolo malo*).[25] Where a seller recklessly tells a half-truth or knows the facts but does not reveal them because he or she has not bothered to consider their significance, this may also amount to fraud.[26] But as this court has said, fraud will not lightly be inferred, especially when sought to be established in motion proceedings.[27] And where a party seeks to do so the allegation must be clear and the facts upon which the inference is sought to be drawn succinctly stated.[28]

[30] The appellant contends that the respondent has not established a case of fraud against her and that the court below therefore erred in

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[24] See above at fn 3.
[25] R H Christie *The Law of Contract in South Africa* 5 ed (2006) p 295; *Van Der Merwe v Meades* 1991 (2) SA 1 (A) at 8E-F.
[26] Christie (above) at p 295.
[27] *Loomcraft Fabrics CC v Nedbank Ltd and another* 1996 (1) SA 812 (A) 822H-I.
[28] *Breedt v Elsie Motors (Edms) Bpk* 1963 (3) SA 525 (A).

finding that the respondent could avail himself of the aedilitian remedies despite the *voetstoots* clause. Counsel for the respondent, on the other hand, contends that the papers establish wilful non-disclosure against the appellant personally and fraudulent misrepresentation against her estate agent. In this regard an estate agent's misrepresentation in the course of executing her mandate binds a seller, whether or not the seller is aware that it was made.[29] The appellant's denial that she was aware of the representations can therefore not assist her.

[31] I deal with the allegations against the estate agent first. In his answering affidavit the respondent avers that she:

'. . . made representations to me that the swimming pool and jacuzzi were free from defects and the improvements to the property were in a faultless condition. I relied on these assurances to buy, but the statements turned out to be false.'

Although this allegation is effectively unchallenged, as the estate agent did not file an affidavit, it does not establish fraud. Indeed the respondent does not even allege that the agent knowingly made false representations, nor does he provide any facts from which that inference can be drawn. At best, his allegation is one of innocent misrepresentation, which must founder in the face of the *voetstoots* clause.

[32] Against the appellant personally, the respondent makes several allegations. It is necessary to analyse each to decide whether a case of fraud has been made against her.

The Outbuilding

[29] *Davidson v Bonafede* 1981 (2) SA 501 (C) at p 504B-C.

[33] This part of the building, the respondent alleges:

'. . . had been locked during our initial inspection of the house and the keys were then not available. We (subsequently) discovered that the ceiling had considerable water damage and had partially collapsed and will have to be completely replaced. We also discovered a sewer manhole in the middle of the laundry; the sewer rodding eye projecting into the shower of the outbuilding bathroom; and another rodding eye in the outbuilding bedroom. The sewer manhole was covered during our inspection of the house and it had become apparent that the above defects had been deliberately concealed from prospective buyers.'

[34] In accordance with the well-established test, the factual premises on which the matter is to be adjudged must derive from the respondent's averments, plus those of the appellant which the respondent cannot deny. However, the respondent's claim that the 'defects had been deliberately concealed' is not itself a fact, but an inference he makes from the facts he states; and to assess its validity the court is entitled to consider the appellant's response. In her replying affidavit she explains that this part of the building was locked during the respondent's inspection because valuable hunting equipment was inside. Importantly, she states that the respondent was not denied access to the building and would have been able to gain access to it if he had asked. She states further that the water damage and the sewer manhole, which she says was not covered, were patent defects discoverable upon a cursory investigation.

[35] As a general rule, where a buyer has an opportunity to inspect the property before buying it, and nevertheless buys it with its patent defects, he or she will have no recourse against the seller.[30] It is apparent that the respondent discovered the water damage immediately after taking

[30] F du Bois *Wille's Principles of South African Law* 9 ed (2007) p 897.

occupation – and thus that he would have done so had he asked for access at the time of his inspection. He has himself to blame for failing to do so and cannot hold his failure against the appellant.

[36] The respondent's averment that the sewer manhole was covered at the time of the inspection must, despite the appellant's denial, be accepted as correct in these application proceedings. However, as explained, his allegation is too vague to lay the basis for a conclusion of fraud. There is no description of how the manhole was covered, nor does the respondent provide any other evidence to support an inference of 'deliberate concealment' against the appellant. The allegation is also confusing because, on the respondent's version, he did not inspect this part of the building. We are left to ponder on how he noticed that the manhole was concealed at the time.

No Approved Plans for the Outbuilding, Carport and Garage.

[37] I have mentioned these allegations earlier.[31] There is no suggestion on the papers that the appellant was aware that the outbuilding did not have approved plans or that the garage contravened building regulations. Even less is there any suggestion of fraud on her part. She herself had purchased the property five years earlier from her predecessor in title.

[38] The appellant's assertion that she was unaware that plans for the carport were not approved is questionable. In the face of the municipality's rejection of the plans on three previous occasions and the absence of any explanation why the drafter whom the appellant paid to draw and submit the plans to the municipality for approval, did not

[31] See above para 7.

depose to an affidavit, it appears unlikely that she was unaware of this problem. However, there is no suggestion on the papers that, if she was aware, she ought to have considered the matter significant enough to mention to the buyer. In any event the respondent's allegations fail to establish that the appellant deliberately concealed this fact from the respondent (the test this court established in *Van Der Merwe v Meades*)[32] – indeed he makes no such allegation.

Miscellaneous Defects

[39] The appellant avers that on the evening his family occupied the property:

'A part of the railing to the staircase leading to the loft room, made of heavy hardwood of the type that was used for railway sleepers, collapsed without warning, narrowly missing my daughter in the living room below and destroying a yellowwood side table that it fell onto. On inspection, it was discovered that this railing was not fastened in any way. During our inspection of the property, this railing was covered with animal skins and this had accordingly been concealed from our attention.'

[40] In her replying affidavit the appellant admits that the railing was covered with animal skins, but denies that it was covered in a manner that concealed how it was secured. There is no factual dispute on this aspect. The respondent makes no allegation of fraudulent concealment – and no such inference can be drawn.

[41] The respondent points to various other defects, which he discovered after taking occupation. These include leaks in the swimming pool, that the jacuzzi was not in proper working order and that there was

[32] 1991 (2) SA 1 (A).

active borer beetle in the wood panelling, all of which I have mentioned earlier.[33] But he does not claim they existed at the time the contract of sale came into existence. Indeed, in her replying affidavit, the appellant avers that when the agreement was signed on 19 March 2006 (that is, more than three months before the appellant occupied the property), there was no sign of these defects. The respondent does not gainsay these assertions – and as the defect must exist at the time of the sale for the buyer to avail himself of the aedilitian remedies,[34] the respondent has no recourse to them. Also, as with his other complaints, he does not establish, on any basis, that the appellant fraudulently concealed these defects.

[42] To conclude, a litigant who undertakes the burden to establish fraud, especially in motion proceedings, must ensure that both his allegations, and the facts on which he relies to underpin them, are clear and specific. The respondent's allegations are, in the main, vague, unspecific and devoid of sufficient evidential support. He therefore failed to lay the basis for a finding of fraud in these proceedings, and thus cannot avoid the consequences of the *voetstoots* clause.

[43] It follows that he had no warrant or justification for his instruction to the bank to stop transfer of the property which, objectively viewed, was a repudiation of the agreement. His repudiation entitled the appellant to in turn invoke the provisions of the forfeiture clause and thereafter to exercise her right of cancellation. His purported election, six weeks later, to abide by the contract is, therefore, of no legal consequence and does not assist him.

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[33] See above at para 11.
[34] Ibid p 897.

[44] The respondent has placed no facts before us to demonstrate that it would be just and equitable not to evict him from the property under PIE. But having regard to the fact that he has occupied the property for more than two years, while paying occupational rent, it would be unduly disruptive to order his immediate eviction, especially because his children are of school-going age and will soon be facing their final examinations. In the circumstances it would be just and equitable for the respondent and his family to vacate the property by no later than 30 November 2008.

[45] It follows that the appeal must succeed. There is an order in the following terms:

(1) The appeal is upheld with costs including the costs of two counsel;
(2) The order of the court below is set aside;
(3) In its place there is substituted the following order:
(a) The application succeeds with costs, including the costs of two counsel.
(b) The respondent is ordered to vacate the property on or before 30 November 2008.

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JUDGE OF APPEAL

APPEARANCES:
FOR APPELLANT: C H J BADENHORST SC and N P G REDMAN
FOR RESPONDENT: J W EKSTEEN SC

ATTORNEYS:

FOR APPELLANT:	MAGEZA LE ROUX VIVIER & ASS; JOHANNESBURG E G COOPER ATTORNEYS; BLOEMFONTEIN
FOR RESPONDENT:	DE VILLIERS & PARTNERS; CENTRHIL HONEY ATTORNEYS; BLOEMFONTEIN