**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**
**JUDGMENT**

Case No: 781//2011
Reportable

In the matter between:

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| **RAYMOND BANDA** | **FIRST APPELLANT** |
| **PATRICIA FYNN** | **SECOND APPELLANT** |
| and | |
| **FRANK JOHANNES VAN DER SPUY** | **FIRST RESPONDENT** |
| **ALICIA ANASTASIA VAN DER SPUY** | **SECOND RESPONDENT** |

**Neutral citation**: *Banda v Van der Spuy* (781/2011) [2013] ZASCA 23 (22 March 2013)

**Coram**: Lewis, Maya, Cachalia JJA and Erasmus and Swain AJJA

**Heard**: 7 March 2013

**Delivered:** 22 March 2013

**Summary*:*** **Knowledge by the sellers of a house that its roof was latently defective and that repairs to it had not properly rectified the latent defect, which they fraudulently concealed, vitiated the effect of a voetstoots clause – an alternative cause of action based upon a fraudulent misrepresentation by the sellers as to the existence of a guarantee in respect of the repairs, which induced the buyers to purchase the house – alternatively, agree upon the price, was causally related to the damage suffered, being the cost of repairing the roof – this was so despite the fact that the guarantee did not cover all of the defects which caused the roof to leak and sellers were unaware of an additional cause of the leak.**

## ORDER

**On appeal from:** South Gauteng High Court, Johannesburg (Boruchowitz J sitting as court of first instance):

1 The appeal is upheld with costs.
2 The order of the high court is set aside and is substituted with the following order:
'The defendants are ordered jointly and severally to pay to the plaintiffs the sum of R449 499 together with interest thereon at the rate of 15.5 per cent per annum from the date of judgment, being 23 September 2011, and costs of suit including the qualifying fees of Mr Visagie.'

## JUDGMENT

**SWAIN AJA** (**LEWIS, MAYA AND CACHALIA JJA AND ERASMUS AJA** concurring):

[1] A thatch roof that leaked prior to the sale of a house by the respondents to the appellants, and which continued to leak after the sale, gave rise to the present dispute between the parties.

[2] The main claim advanced before the South Gauteng High Court (Boruchowitz J) by the appellants, was based upon the *actio quanti minoris*, in which a reduction in the purchase price was sought, being the cost of repairing the roof, to cure the leaks. The agreement of sale contained a voetstoots clause. This placed the added burden upon the appellants of not only proving the existence of the latent defects in the roof, but also that the respondents

were aware of these defects which caused the roof to leak, and thereby fraudulently neglected to inform the appellants of their existence.

[3] Two further alternative causes of action were advanced by the appellants. One was based upon a fraudulent misrepresentation by the respondents as to the existence of a guarantee in respect of repairs done to the roof and the other was founded on the *actio ex empto*. None of these claims found favour with the trial court, with the result that they were dismissed. The appellants were granted leave to appeal to this court.

[4] The trial court found that the defects in the roof were latent in nature, but upheld the defence of the respondents that they were excused from liability by virtue of the provisions of the voetstoots clause. The trial court found that the appellants had failed to establish on a balance of probabilities that, when the sale agreement was concluded, the respondents had knowledge of the latent defects 'and designedly, craftily or fraudulently, concealed their existence from the plaintiffs'.

[5] There is no challenge by the respondents by way of a cross-appeal against the finding of the trial court, that there were latent defects in the roof at the time of the sale. Indeed, from the evidence it is abundantly clear that this was the case.

[6] Accordingly the issue for determination is whether the appellants proved the requisite knowledge on the part of the respondents of the latent defects in the roof, which they then fraudulently concealed from the appellants. By virtue of the fact that it was common cause that the respondents had effected repairs to the roof before the sale, this would also embrace a determination of the issue of whether, to the knowledge of the respondents, these repairs did not properly or adequately rectify the defects in the roof to prevent the roof leaking.

[7] In order, however, properly to address the issue of whether the respondents possessed knowledge of the latent defects in the roof, it is

necessary to briefly deal with the evidence concerning the nature of the defects in the roof, which caused the roof to leak. The evidence led by the appellants was that of Mr Jan de Wet Bornmann, an independent assessor of insurance claims, employed by the bond holder over the house, namely Absa Bank and Mr Abraham Visagie, a professional engineer who was called as an expert witness. No evidence was led by the respondents to contradict the testimony of these witnesses.

[8] The evidence of these two witnesses clearly established that the cause of the leaks in the roof was twofold. Bornmann's evidence was that the wooden roof poles were inadequate properly to support the weight of the thatch roof and would have to be reinforced. As a result, the roof was gradually collapsing, moving downwards, as well as laterally. As a consequence of the movement in the roof, openings had appeared between the flashing and the thatch, through which rainwater had gained ingress and flowed down the internal walls of the house.

[9] Visagie testified that the cause of the leaks was the inadequate pitch of the roof. The recommended pitch for a thatch roof was 45 degrees. The roof of the house was less than 30 degrees in places and could not be regarded as functional, because the thatch fibres would have a negative gradient and water would not run off the roof, but into the thatch. As a consequence, the thatch would stay wet and would rot much more quickly than it was supposed to. Much of the top layer of thatch had rotted away when he inspected the roof and leaks had occurred in various locations. In addition, severe deflection was visible in the ridge line which he regarded as a failure. At the time the repairs to the roof were carried out, it had already deflected beyond the point of repair. In Visagie's opinion, the only way to repair the roof was to demolish it and reconstruct it in accordance with a properly engineered design with the correct pitch.

[10] The trial court correctly found in the light of this evidence that the design of the roof structure was inadequate, the thatch roof was not functional, leaks would occur and the remedial work performed would not make the structure

safe and pass engineering guidelines. As pointed out, the trial court then concluded that these defects were clearly latent.

[11] An assessment of whether the appellants proved that the respondents knew of the latent defects in the roof which caused it to leak, and whether they also knew that the repairs effected would not permanently solve the problem of it leaking, in the face of the first respondent's denial that he possessed such knowledge, requires an assessment of the objective facts. Any inference must be drawn from the facts revealed by the evidence.

[12] As pointed out in *R v Myers* 1948 (1) SA 375 (A) at 383:

'. . .absence of reasonable grounds for belief in the truth of what is stated may provide cogent evidence that there was in fact no such belief.'

Similarly in *Hamman v Moolman* 1968 (4) SA 340 (A) at 347A the following was added:

'The fact that a belief is held to be not well-founded may, of course, point to the absence of an honest belief, but this fact must be weighed with all the relevant evidence in order to determine the existence or absence of an honest belief.'

[13] Central to this enquiry is the evidence concerning the undertaking given by the first respondent to the appellants, contained in an addendum to the contract of sale, executed on 25 July 2007 providing as follows: 'Seller to transfer guarantee on thatch roof to purchaser from the contractor.' The first respondent was forced to concede that when he signed the addendum, to his knowledge, there was no guarantee in existence, because the time period for which it was furnished had expired. The trial court correctly concluded that: 'To have undertaken in these circumstances to provide a guarantee was thoroughly misleading and in my view fraudulent'. In addition, a consideration of the first respondent's evidence in relation to what he alleged was the duration of the guarantee, reveals a similar distressing lack of veracity.

[14] The first respondent's legal representative presented the respondents' case on the basis that Braaff, the contractor, had given an oral guarantee of one

year to first respondent's brother. However, when giving evidence the first respondent said that he asked Braaff for a guarantee until after the rains, to which Braaff agreed. When the first respondent was asked where his legal representative had obtained the idea that the guarantee was for one year, he gave a clearly fallacious reply in which he attempted to reconcile a guarantee for one year with the date in the following year when the first rains fell.

[15] On the other hand Braaff maintained that the first respondent had asked for a guarantee for six months, to which he agreed. It is significant that when Braaff was asked to furnish a guarantee, which he did on 27 July 2007, to enable the respondents to comply with their obligations in terms of the addendum, it was for a period of six months only. This elicited no protest from the first respondent, who maintained that he did not see the document when it was furnished. In my view it is highly improbable that the first respondent, knowing that the furnishing of a valid guarantee had been elevated to the status of an obligation in terms of the addendum, would have had no interest in the duration of the guarantee furnished by Braaff.

[16] The evidence clearly establishes that the first respondent was untruthful concerning the duration of the guarantee. That he was dishonest in regard to the guarantee's duration clearly shows he appreciated the danger to the sale of the house, inherent in a guarantee which was worthless, because it had expired. The trial court found that '[o]n the probabilities the defendants gave the undertaking to deliver, what at that stage was a non-existent guarantee, because they did not wish to sabotage or derail the contract and hoped that in the fullness of time there would be no need on the part of the plaintiffs to rely upon same'. The trial court did not, however, interrogate the further issue, namely, why the respondents would fear disclosure of the non-existence of the guarantee? If the first respondent believed in the adequacy of the repairs, why did the first respondent not simply disclose that the guarantee had expired and invite an inspection of the roof? That the first respondent did not do so speaks volumes for his lack of belief in the adequacy of the repairs.

[17] It is necessary, however, to examine the relevant evidence to determine whether there were reasonable grounds for the professed belief of the first respondent in the adequacy of the repairs effected by Braaff. Bornmann said his great fear, which he pointed out to the first respondent, was that if nothing was done to stop the movement of the roof, it would become worse and could eventually collapse, causing damage to the structure of the walls. He told the first respondent that the reinforcement of the roof was not as he would have wished, but what had been done was better than doing nothing. In other words, it would delay further movement of the roof. The first respondent conceded that Bornmann had said that the work was not done as Bornmann would have done it, but that it was acceptable ('aanvaarbaar') if he could use that word.

[18] According to the first respondent, Bornmann stated that the roof was much better than it was and that the problems with the roof had been permanently cured ('dit sal stopgesit word nou'). This was in direct contradiction to what Bornmann had said, namely that the repairs would only delay further movement of the roof, which statement was never challenged. If the first respondent truly believed that this was Bornmann's view of the adequacy of the repairs, why did he not disclose the non-existence of the guarantee and refer the first appellant to Bornmann for confirmation, that the problems in the roof had been permanently rectified? That the first respondent did not do so again speaks volumes for his lack of belief in the adequacy of the repairs.

[19] A further issue which must be addressed, in the context of determining the bona fides of the first respondent's professed belief in the adequacy of the repairs, is his contention that he believed that the repairs were acceptable because he continued to enjoy insurance cover over the roof by Absa Insurance, after the repairs had been effected. It was originally put to Bornmann that the first respondent would say that he had phoned Bornmann to inspect the repairs, because the first respondent was worried about his insurance cover and had wanted to be satisfied that the repairs would not place his insurance at risk. Bornmann emphatically disputed that there was any basis upon which he would inspect a property to certify that the property was free of any defects,

latent or otherwise, or that he would inspect the property purporting to represent Absa and certify that the property was insurable. The first respondent maintained that although Bornmann had said the repairs were not executed as he would have liked, Bornmann did not explain what he meant, or elaborate upon his reservations. When asked why he did not ask Bornmann what he meant, he replied that it was not important to him because Absa had satisfied him that the repairs were acceptable and he again had insurance cover on his roof. He added that this was not conveyed to him but was what he concluded. When the first respondent was asked why he did not directly address this issue with Bornmann, he replied that Bornman worked with the bank and he believed that Bornmann would correspond with the bank.

[20] In *R v Myers* (at 382) Greenberg JA, quoting Halsbury 2 ed vol 23 sec 59, stated that a belief is not honest which

'though in fact entertained by the representor may have been itself the outcome of a fraudulent diligence in ignorance – that is, of a wilful abstention from all sources of information which might lead to suspicion, and a sedulous avoidance of all possible avenues to the truth, for the express purpose of not having any doubt thrown on what he desires, and is determined to, and afterwards does (in a sense) believe.'

[21] The first respondent quite clearly avoided asking Bornmann what his reservations were in regard to the adequacy of the repairs to the roof and whether this would affect his insurance cover. He also avoided directing the same enquiry to Absa Insurance. His conduct cannot be construed as anything other than a 'wilful abstention' from both sources of information, which would, according to his professed understanding of what the purpose was of Bornmann's visit, have led to an answer to his fears. That he did not do so indicates an avoidance by him of all possible avenues to the truth, for the express purpose of not having any doubt thrown upon what he desired and was determined to believe.

[22] When all of the above is considered, it is clear that the first respondent did not possess an honest belief in the adequacy of the repairs that were effected to the roof, such that the problem of leaks in the roof had been

permanently addressed. Considered together with the fraudulent conduct of the respondents in not disclosing the absence of a valid guarantee and their dishonesty in relation to the duration of the guarantee, it is clear that they possessed knowledge of the structural defects in the roof, identified by Bornmann, which were a cause of the roof leaking, and which had not been permanently repaired by Braaff. At the very least, they were conscious of the inadequate nature of the repairs to the defects in the roof, which gave them reasonable grounds to suspect that the leaks in the roof had not been fixed, and they were therefore obliged to disclose this knowledge to the appellants. See A J Kerr *The Law of Sale and Lease* 3 ed (2004) at 148.

[23] It is, however, clear that the respondents were not aware that an additional cause of the leaks in the roof was the inadequate pitch of the roof as identified by Visagie. Braaff maintained that he had identified this problem and told the first respondent, which the first respondent denied. Braaff also said that before he had delivered a quotation to repair the roof, he had inspected the roof with Bornmann and they had discussed the roof and Bornmann had pointed out to him what the problem was. If Braaff was aware of the serious problem in the roof, namely the inadequate pitch, and had inspected the roof with Bornmann, it is highly improbable that he would not have mentioned it to Bornmann. It is, however, clear that Bornmann was not aware of this problem in the roof when he compiled his report. In addition if Braaff was aware of this problem in the roof, it is unlikely that he would have suggested repairs which would not have addressed the problem. His explanation that he had not quoted to remove the roof, because if he had, he would not have obtained the job, rings hollow. Considering all of the above, it is clear that Braaff did not possess knowledge of the inadequate slope of the roof and accordingly could not have told the first respondent of this defect. In this context I agree with the trial court's view that Braaff was neither a reliable nor satisfactory witness.

[24] It is trite that a seller is liable for all latent defects which render unfit or partially unfit, the res vendita for the purpose for which it was intended to be used. See G R J Hackwill and H G Mackeurtan *Sale of Goods in South Africa* 5

ed (1984) at 135. A leaking roof is a latent defect which renders the house unfit for habitation. The respondents were aware of one of the causes for the leaking roof, namely inadequate roof design, which resulted in the sagging of the roof, which had not been permanently repaired and which they had concealed. The respondents were unaware, however, of the other cause of the leaking roof namely, the inadequate pitch of the roof. The fact that they were unaware of an additional cause of the leaking matters not. Their fraudulent conduct in concealing the existence of the defective leaking roof forfeits the protection of the voetstoots clause in respect of this latent defect.

[25] The appellants are accordingly entitled to the difference between the purchase price of the house and its value with the defective roof. (See Hackwill supra at 156 para 10.6.1.) No evidence was led of the market price of the house with the defective roof at the time of the sale. It seems self-evident, however, that there would not be a market for a house where the whole roof has to be replaced. Where there is no market the court is entitled to fix the sum for which the house could have been restored. (See Hackwill supra at 157 para 10.6.2.) The cost of repairs may be used as a measure of the award to be made where the actual value could not be determined, or is difficult to determine. See *Labuschagne Broers v Spring Farm (Pty) Ltd* 1976 (2) SA 824 (T).

[26] An alternative cause of action was based upon the fraudulent, alternatively, negligent misrepresentation by the respondents that a valid written guarantee, regarding the soundness of the thatch roof, was in place and that the defect had been rectified. As pointed out, the trial court found that the respondents were aware that the guarantee had lapsed when the addendum was signed and the undertaking to provide one was misleading and fraudulent. The trial court found that a fraudulent misrepresentation was made by the respondents to the appellants in regard to the guarantee. I agree with this view.

[27] The trial court, however, found that the damages claimed, being the cost of replacing the thatch roof, did not arise as a direct consequence of the respondents' fraudulent conduct in relation to the guarantee. The reasoning of

the trial court was that the guarantee, even if provided by the respondents to the appellants (presumably as a valid guarantee) would not have prevented the appellants from suffering loss as a result of the presence of the latent defects, because the guarantee, given by Braaff, only related to the remedial work performed and did not operate as a guarantee in respect of all latent defects.

[28] The first appellant's evidence was that if the first respondent had not informed him of the guarantee he would not have signed the agreement, and if this was conveyed to him when the addendum had been signed, he would not have proceeded with the transaction. The first appellant also stated that if he had been aware of the problem with the roof, he would have had an expert assess the roof and furnish him with a quotation of what it would cost to restore it. He would then have negotiated with the respondents regarding the quotation because they really liked the house. If agreement could not be reached, then they would not have gone ahead with the purchase. On the evidence, the existence of a guarantee in respect of the repairs to the roof had played a vital role in the conclusion of the agreement, right from the outset. It was for this reason that it was elevated to a term of the agreement, by the first appellant, in terms of the addendum. It is quite clear that the appellants were induced by the fraudulent misrepresentation to conclude the sale agreement or, at least, to pay the purchase price agreed upon.

[29] It is trite that the claim of the appellants, based as it is in delict, is one in which the appellants seek to recover the amount by which their patrimony has been diminished. See *Trotman & another v Edwick* 1951 (1) SA 443 (A) at 449B-C. The fraud of the respondents may be considered either as having causally effected, not the transaction as a whole, but only the roof of the house, as a distinctive part having special significance to the appellants. The fraud therefore affected only the amount of the purchase price that the appellants agreed to pay. On this basis the so-called 'swings and roundabouts' principle of computing the damages would be inapplicable and the cost of repairing the defect would be the appropriate measure. See *Ranger v Wykerd & another* 1977 (2) SA 976 (A) at 992A-B. Alternatively, the fraud of the respondents may

be regarded as causally related to and affecting the transaction as a whole. In the present case, as in *Ranger*, it may be inferred as a fact that the agreed purchase price for the house, was prima facie its actual market value in its represented condition (with a properly repaired roof) at the time of the sale. The first appellant stated that they had initially offered an amount less than the asking price, which was rejected by the respondents. The respondents then offered an amount in return as the sale price, which the appellants accepted. The amount agreed upon constituted a small reduction in the listing price of the agents. There was no evidence led by the respondents to disturb such a prima facie inference on the facts of this case. (*Ranger* at 993C-E.)

[30] Whether the fraud of the respondents induced the appellants to conclude the sale agreement, or simply to agree upon the purchase price, it is clear that the fraud did occasion as cause and effect the patrimonial loss sustained by the appellants. On either basis, the correct manner of computing the appellants' loss is the cost of repairing the roof. That the cost of repairing the roof included the costs of rectifying a defect of which the respondents were unaware ie the pitch of the roof, which was an additional cause of the roof leaking, is irrelevant to this inquiry. That the terms of the guarantee only covered the repairs to the roof effected by Braaff, and not all latent defects in the roof, is likewise irrelevant.

[31] In addition, the respondents knew when making the fraudulent misrepresentation, that because the roof had not been properly or adequately repaired, it would leak in the future and it would have to be repaired to render the house habitable. The evidence establishes that the reasonable cost of repairing the roof to prevent it leaking necessitates that the roof be replaced. That the respondents did not foresee that the reasonable cost of repairing the roof would entail its replacement, matters not. The reasonable costs of repairing the roof are directly and causally connected with the fraud and are not remote. (*Ranger* at 994F-G.) The trial court accordingly erred in restricting the causative effect of the fraudulent misrepresentation to those defects which would have

been covered by the invalid guarantee. It is therefore unnecessary to deal with the remaining alternative cause of action based upon the *actio ex empto*.

[32] The appellants are accordingly entitled to the reasonable cost of repairing the roof. Visagie tendered evidence that the cost of repairing the roof in 2007 as at the date of the sale was R309 698. In the appellants' amended particulars of claim this was the amount advanced. Visagie stated that the cost of rebuilding the internal walls and gables to accommodate the increased pitch of the roof, calculated in 2010, was R110 000. This price would have to be discounted by 30 per cent to arrive at the cost in 2007, which discount produced an amount of R84 600. The total claim accordingly advanced by the appellants in their amended particulars of claim was R449 499. I do not agree with the view of the trial court that there was no justification in the evidence for the amount claimed. Visagie explained how the calculation was done and there was no evidence lead by the respondents to contradict his views.

[33] As regards the interest payable on this amount, in the particulars of claim interest was claimed at the rate of 15.5 per cent per annum *a temporae mora*. In the appellants' heads of argument interest was claimed as from the date of inception of the trial, being 8 October 2010. However, during the hearing counsel for the appellants agreed that interest should run only from the date upon which judgment was delivered by the trial court being 23 September 2011. Interest will accordingly run from this date.

[34] In the result the following order is made:

1 The appeal is upheld with costs.
2 The order of the high court is set aside and is substituted with the following order:

'The defendants are ordered jointly and severally to pay to the plaintiffs the sum of R449 499 together with interest thereon at the rate of 15.5 per cent per

annum from the date of judgment, being 23 September 2011, and costs of suit including the qualifying fees of Mr Visagie.'

**K G B SWAIN**
**ACTING JUDGE OF APPEAL**

APPEARANCES:

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| FOR FIRST AND | M WAGENER |
| SECOND APPELLANTS: | BOWMAN GILFILLAN ATTORNEYS |
| | MATSEPES INC, Bloemfontein |
| FOR FIRST AND | B M HEYSTEK |
| SECOND RESPONDENTS: | Instructed by: MARITZ BOSHOFF & DU PREEZ INC |
| | BEN VAN DER MERWE INC, Bloemfontein |