

SUMMARY OF THE JUDGMENT

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>> PROPERTY LAW UPDATE

LIABILITY FOR FAILURE TO ADVISE PURCHASER

Cape Agulhas Hotel CC v Liesbeeck Motors (Pty) Ltd (1479/09) [2015] ZAWCHC 27 (6 March 2015)

Where a seller appreciates that water access is material to the purchaser's intended use of the property, but does not sufficiently inform the estate agent or purchaser as to the real position, is the seller guilty of a fraudulent misrepresentation? This case is a valuable guideline as to the evaluation of facts that a court would apply in such circumstances.

The Judgment can be viewed [here](#).

FACTS

In January 2006, a large house situated on the banks of the Breede River, was sold voetstoots by Liesbeeck Motors (Pty) Ltd (Liesbeeck) to Cape Agulhas Hotel CC (Cape Agulhas).

After transfer, issues arose with regard to the supply of water to the property. Cape Agulhas alleged that prior to the conclusion of the sale, Liesbeeck orally represented to it that there was a water supply agreement in place with the owner of the neighbouring property, in terms of which the property had access to water from a borehole on the former property. These representations appeared to be false in that the water supply agreement had expired on 1 May 2005 and, so Cape Agulhas alleged, Liesbeeck was aware thereof.

Cape Agulhas further alleged that:

- Liesbeeck knew that Cape Agulhas would need water for the small scale farming plans it had for the property and was therefore under a duty not to misrepresent the position regarding the water supply agreement;
- had the misrepresentation not occurred, Cape Agulhas would not have purchased the property, or would have purchased the property at a lower price; and
- the misrepresentations were intended to induce Liesbeeck to purchase the property, or to purchase the property at a higher price than it would otherwise have done.

Cape Agulhas accordingly claimed damages from Liesbeeck pertaining to the costs of providing water to the property.

Liesbeeck defended the matter and alleged that prior to the conclusion of the sale agreement, Cape Agulhas was advised by the estate agent that water was a problem for all properties situated in the area; that there was a water supply agreement with the neighbour but that the agent was not aware of all the detail pertaining thereto, that Cape Agulhas was advised to speak to Liesbeeck to obtain more details and that there therefore was no misrepresentation.

HELD:

(Much of the judgment dealt with the court's careful analysis of the contradictory testimonies of the estate agent, purchaser and seller in this matter, and unfolds much of the surrounding facts. This is not analysed here but can be read in the judgment itself.)

Misrepresentation

- The facts showed that the estate agent made a number of representations to Cape Agulhas regarding the property and, more particularly, about the water supply. It was, amongst other things, shown that:
 - Cape Agulhas had asked many questions regarding the water supply and advised that Cape Agulhas' sole member intended living on the property semi-permanently and not use it only as a weekend home;
 - the agent had told Cape Agulhas that there were water challenges, but that these had been solved through the water supply arrangement with the neighbouring farm; and
 - Cape Agulhas was advised that the arrangement was a permanent one and "like a servitude".
- A principal is liable for misrepresentation made by his or her agent: every person who authorises another to act for him in the making of any contract undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he negotiates the contract.
- Accordingly, the representations made by the agent was authorised by Liesbeeck in the sense that Liesbeeck accepted the risk of those representations.
- The representations were material.

The Voetstoots Clause

- The contract contained a *voetstoots* clause as well as a so-called non-representation clause.
- 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. 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 the significance, this may also amount to fraud.
- The facts did not show that the estate agent involved knew that the representations were false at the time when they made them. It appeared rather that Liesbeeck knew that false or incomplete information would be used by the estate agents to make representations to Cape Agulhas or foresaw the possibility that false information might be used and was reconciled to this, as it did nothing to consider its significance and effect. Liesbeeck knew however that the issues relating to the water availability, especially for the small farming intentions of the purchaser, were material facts that influenced the purchaser's decision.
- The facts indeed showed that Liesbeeck, in its meeting and interaction with Cape Agulhas, recklessly told the half-truth or knew of facts, but did not reveal them, and did not bother to consider their significance in the circumstances.
- As such, it was proved by Cape Agulhas that there was an intention to defraud. This was supported too by the fact that the property had a successful and vibrant garden, had been marketed as a small hotel or large guest house, had 26 rooms including 6 en-suite bathrooms and a swimming pool. The property gave the impression that there was no shortage of water.
- The evidence supported an inference that Liesbeeck knew that Cape Agulhas would, in all probability, ask about the water, and knew that the less was told to the estate agent, the more certain it was that Cape Agulhas would be brought under a misapprehension regarding the water.

The court thus held that Liesbeeck acted fraudulently. Clearly, had Cape Agulhas been advised about the termination of the water supply agreement, it would either not have purchased the property or would have purchased the property at a price below that which

was paid. Furthermore, it was clear that the only purpose of Liesbeeck not disclosing the termination of the water supply agreement was to induce Cape Agulhas to purchase the property at the highest price possible. Judgment was accordingly granted in favour of Cape Agulhas.

CONTACT US

■ CAPE TOWN
Tel: 021 406 9100

■ SOMERSET MALL
Tel: 021 850 6400

■ TYGER VALLEY
Tel: 021 943 3800

■ CENTURION
Tel: 012 001 1546

■ CLAREMONT
Tel: 021 673 4700

■ STELLENBOSCH
Tel: 021 001 1170

■ MENLYN
Tel: 012 348 1682

■ BEDFORDVIEW
Tel: 011 453 0577

■ FISH HOEK
Tel: 021 784 1580

■ TABLE VIEW
Tel: 021 521 4000

■ ILLOVO
Tel: 011 219 6200