

THE RISKS OF HALF-TRUTHS ABOUT A LEAKING ROOF IN THE SALE OF A HOME

Le Roux v Zietsman and Another (HCA10/2020) [2021] ZALMPPHC 79 (2 November 2021)

When the Zietsmans purchased a sprawling guesthouse, they were advised by the seller of one or two leaks in the roof which had been fixed. Three months later, they were rushing around trying to appease guests whose rooms were rendered uninhabitable after the first seasonal rains pooled in their rooms, wet the bedding and carpets and ruined their suitcases. An engineer's report found a poorly constructed roof, coupled with evidence of various earlier efforts to fix leaks. The double-garage-sized sheeting that the seller had used to fix the small leak in the one room, pointed to the extent of the problems and to his prior knowledge thereof. Ten years later, after various court skirmishes, the seller was ordered to make good the damage suffered by the purchasers, including losses suffered when they could not accommodate guests. The judgment explains how a court approaches a claim based on latent defects.

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

FACTS

In March 2011, the Zietsmans bought a property from Le Roux and took occupation three months later. It was known by all parties involved that the Zietsmans intended to run a guesthouse facility from the property.

When the first rains fell in September/October 2011, the roof leaked badly. All the rooms were affected, some worse than others. Bedding and luggage was soaked, floors were wet and furniture was damaged and had to be replaced. Guests had to be moved.

During a visit to the property in February 2011, with the estate agent, they noticed marks on the ceiling in one room and upon their enquiry, Le Roux stated that the roof had leaked but that it had been fixed. They also noticed water damage to the cornice in another room and again Le Roux stated that there was a leak which had been fixed. They further noticed damp in the toilet of room 7 which, Le Roux explained, resulted from a leaking pipe in the wall, which had been fixed. When they visited the property again, there were new tiles installed where the damp had been. (It was later discovered that the leaking pipe had never been fixed.)

The Zietsmans instituted a claim under the Homeowners Insurance Policy, but the claim was rejected due to the findings of the assessor. Initially, they did not have the funds to repair the roof and coped as best as they could. Every time it rained, the roof leaked again.

In 2013, they appointed a civil engineer, Mr. Rosslee, who inspected the roof and provided a report. The conclusion in paragraph 6 of his report was that the roof was poorly constructed and maintained resulting in it being prone to leak from the day it was built. His report further stated that there is much evidence that efforts were made to seal off leaks in the past and that the problem had escalated with time, because many tiles were damaged by workers during maintenance efforts. There were many signs that plastic sheeting had been used in an attempt to prevent leaking, but this method is totally ineffectual. In cross-examination Mr. Rosslee said he found it impossible to believe that Le Roux had not encountered problems during the five years plus that he owned the property. Of particular importance in Mr. Rosslee's report was where it is stated: "Any claim by the previous owner that no problems with the roof leaks were experienced in the past, would simply be impossible and untruthful".

Eventually the Zietsmans obtained a loan and commenced repair work in March 2014. It was impossible to continue conducting a guesthouse business with the roof in its defective state.

According to the Zietsmans, had they been aware of the condition of the roof, they would never have bought the

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property.

Le Roux testified that he occupied the property for just over 5 years before the Zietsmans took occupation. During that time only room 7 had a small leak, which he had fixed. Le Roux denied that he had experienced any other leaks.

HELD

- Taking into consideration the conspectus of the evidence on record and the credibility of all the witnesses in this matter, it was accepted as a fact that with the first rains of September/October 2011, all the rooms of the property leaked. This was confirmed by the testimony of the Zietsmans and the estate agent which is also strongly corroborated by the objective evidence of the engineer, Mr. Rosslee. Once it was accepted that all the rooms leaked, it became inconceivable that the condition of the roof as alleged by Le Roux could have deteriorated so dramatically in a period of three months.
- Le Roux's version was irreconcilable with Mr. Rosslee's evidence that there were numerous places where rainwater had direct access to the ceiling below, as a result of longstanding defects in the roof construction.
- The Zietsmans had thus proved that the *whole roof of the property had latent defects*.

Issues for determination

- The issue for determination in the present appeal was whether the Zietsmans proved the requisite knowledge on the part of Le Roux of the latent defects in the roof, which he then fraudulently concealed from them. In the face of Le Roux's denial that he possessed such knowledge, it required of the Court to assess the objective facts.
- Le Roux argued that the Zietsmans did not prove that he had acted fraudulently and that the Court therefore erred in finding that the Zietsmans could avail themselves of the aedilician remedies (these are the legal actions that are available in terms of Roman law, whereby a party may protect themselves against latent defects in the thing sold) despite the voetstoets clause. The Zietsmans argued that the evidence established willful non-disclosure on the side of Le Roux.

The law on latent defects

- Defects, whether latent or patent, are abnormal qualities or attributes which destroy or substantially impair the utility or effectiveness of the property for the purpose for which it had been sold and is commonly used.
- Defects are latent in that they would not have been visible or discoverable upon inspection by the ordinary purchaser. A seller in a contract of sale has a duty to disclose latent defects in the *merx* (the Latin word for 'the item sold') of which the seller is aware. A seller will be deprived of the protection afforded by a voetstoets clause where the purchaser can prove that the seller: (i) was aware of a defect in the *merx* at the time of the making of the contract; and (ii), *dolo malo* (out of fraud or deceit) concealed its existence from the purchaser with the purpose of defrauding him. It is also trite that 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. The voetstoets clause in a contract of sale in this instance will not relieve the seller from liability for misrepresentation.
- Fraud will never be lightly inferred, 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 must be succinctly stated.

- The operation of the voestoots clause in a contract of sale is thus confined to cover those latent defects which the seller did not deliberately conceal in order to induce the contract. It follows that, in the present matter, the Zietsmans had to prove that Le Roux:
 - was aware of the defects in the property at the time of the negotiations and the conclusion of the agreement of sale;
 - had a duty to disclose the defects to them; and
 - misrepresented the status of the defects and/or concealed the existence and/or extent of the defects in order to defraud them.

Was there a fraudulent non-disclosure or misrepresentation by Le Roux?

- To determine whether the Zietsmans proved that Le Roux knew of the latent defects in the roof which caused it to leak, in other areas besides room 7, and whether he also knew that the repairs he made would not permanently solve the problem of it leaking, the objective facts had to be assessed.
- The objective facts showed that: (i) When the first rains fell after the Zietsmans took occupation of the property, the roof leaked badly; (ii) the uncontested evidence of the civil engineer was that the entire roof spoke of negligent design, inferior workmanship and bad maintenance; (iii) according to Mr. Rosslee, it was impossible to believe that Le Roux had not encountered problems with leakage of the roof during the five years plus that he owned the property; (iv) there was overwhelming evidence that the design and construction of the roof was seriously flawed and that it was prone to leak from day one.
- In addition, on Le Roux's own version, he had conducted maintenance to the roof in painting it and, at least once, called a contractor to deal with the leak in the roof. That contractor would have had to diagnose the problem in the roof in order to advise Le Roux on a solution. It is very unlikely that the contractor would not have noticed and would not have alerted Le Roux to at least some of the structural defects. It was noteworthy too that Le Roux admitted to knowledge of a spot on the ceiling of room 7, but nonetheless used plastic sheeting/membrane larger than a double garage to address it. This surely indicates knowledge of a leak far more extensive than what he admitted to.
- It was therefore highly improbable that Le Roux was not aware of the extent of the defects and the widespread problem with leaks in the roof. Furthermore, the roof could not possibly have deteriorated from the condition which Le Roux alleged in evidence, namely that only room 7 leaked, to its actual condition three months later when all the rooms leaked.

Duty to disclose

- Such duty definitely existed. The property was to be used as a guesthouse and the importance of having a well maintained structure to conduct such a business is a given fact. The fact that there were extensive leakage problems with the roof is material and Le Roux had a duty to disclose this to the Zietsmans.
- Taking into consideration the circumstances in which Le Roux failed to disclose the true extent of the leakage of the roof and the defects in the roof, the Court came to the conclusion that the information had been withheld by Le Roux to secure the sale and to benefit himself.

Voetstoots

- A seller is deprived of the protection of a voetstoots clause in circumstances where the seller perpetrated a fraudulent non-disclosure. As the Zietsmans successfully proved the fraudulent non-disclosure, the voetstoots clause was not a bar to their claim in this case.

CONCLUSION

The Zietsmans were accordingly entitled to the reasonable costs of repairing the roof and other concomitant loss they may have suffered, and the appeal was dismissed.