

PROPERTY SELLER LIABLE TO PROVIDE OCCUPANCY CERTIFICATE?

Werner and Another v Barnard N.O. and Others (8903/2021P) [2023] ZAKZPHC 32 (17 March 2023)

This judgment raises the question whether a seller who undertook to give vacant occupation to a purchaser of a property, thereby becomes liable to provide occupation in respect of premises for which an occupancy certificate had been issued. It appears not, unless there was a specific provision to that effect in the agreement. The summary below explains the reasoning.

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

FACTS

Mr and Mrs Werner bought a property from a deceased estate. The agreement of sale was negotiated between the heirs of the deceased estate and the Werners, and signed by the executrix (in her capacity as administrator of the estate of the deceased owner).

The agreement provided that the Werners would be granted vacant occupation upon registration of transfer. Transfer was registered in July 2021 and the Werners took occupation in August 2021.

When the Werners complained of certain faults with the building, the executrix asked the municipality to do an inspection. The municipal building inspector, after visiting the property, sent an email to the executrix and stated that the property was not ready to be occupied. He advised that the 'clients' had to vacate the house immediately. It appeared that, amongst other things, an occupancy certificate had never been issued in respect of the building on the property. (The history to the building works on the property was that the building plans were approved in 1992-1993. The (deceased) owner was a home builder and performed most of the work himself, whilst residing there with his wife for 25 years. When they both had passed away, their son attended to the completion of the building works which he financed himself. At the time of the sale, the building work on the house was almost complete, said the son, and all that remained was for the kitchen to be installed and a 'few snags' to be attended to. This was denied by the Werners.)

The Werners argued that it is a mandatory requirement for the sale of a property that an occupancy certificate must be provided or must be available, in compliance with section 14(4)(a) of the National Building Regulations and Building Standards Act 103 of 1977 (the Act). They insisted that the executrix had to give them *vacant possession* and that this phrase implied *lawful possession*. This meant, they argued, that a certificate of occupancy had to be provided to them by the executrix failing which their occupation would be unlawful. They accordingly instituted proceedings in the High Court enforcing the provisions of the agreement.

The executrix argued that:

1. Section 14(1) of the Act provides that an 'owner of a building ... or any person having interest therein', may apply for and be issued with a certificate of occupancy. Accordingly, since the estate ceased to be owner in July 2021, the estate could no longer apply for and obtain an occupancy certificate.
2. In any event, she argued, there was no contractual obligation on her to obtain an occupancy certificate and it was not specified as a term in the written sale agreement.
3. Further, she stated that it is not a mandatory requirement for the sale of an immovable property to provide an occupancy certificate and that in the present matter, vacant occupation had passed to the Werners.

The Big Small Firm

stbb.co.za

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town
Claremont
Fish Hoek
Helderberg

T: 021 406 9100
T: 021 673 4700
T: 021 784 1580
T: 021 850 6400

Blouberg
Tyger Valley
Illovo
Fourwavs

T: 021 521 4000
T: 021 943 3800
T: 011 219 6200
T: 010 001 2632

Centurion
Bedfordview
East London

T: 012 001 1546
T: 011 453 0577
T: 043 721 1234

The heirs of the deceased owner (who negotiated the sale with the Werners and who were cited as defendants) further argued that it was a *voetstoots* sale and that they were protected as a result, as they had no knowledge of the fact that there was no occupancy certificate.

The Werners argued that the matter does not involve the question whether or not there were latent or patent defects in the property and that *voetstoots* was not relevant here. Rather, they contended, the dispute centered around the granting of *vacant possession*. They argued that the purpose of the sale was to provide them with a residential property to live in, which was impossible to comply with because the municipality refused to issue an occupation certificate. They were therefore enforcing the contract by requiring the executrix to make good on the sale and deliver *vacant possession*. Occupation is not vacant if it is unlawful, they contended.

HELD

- The Werners relied on section 14(4)(a) of the Act which relates to certificates of occupancy in respect of buildings. The relevant portions read as follows:

'(1) A local authority shall within 14 days after the owner of a building of which the erection has been completed, or any person having an interest therein, has requested it in writing to issue a certificate of occupancy in respect of such building-

(a) issue such certificate of occupancy if it is of the opinion that such building has been erected in accordance with the provisions of this Act and the conditions on which approval was granted ...

(b) in writing notify such owner or person that it refuses to issue such certificate of occupancy if it is not so satisfied

...

(4)(a) The owner of any building or, any person having an interest therein, erected or being erected with the approval of a local authority, who occupies or uses such building or permits the occupation or use of such building-

(i) unless a certificate of occupancy has been issued in terms of subsection (1)(a) in respect of such building;

...

shall be guilty of an offence.'
- The Supreme Court of Appeal (in *Odendaal v Ferraris*) held that a *voetstoots* clause did indeed cover the absence of statutory authorisations. However, *'... the absence of the statutory approvals for building alterations, or the other authorisations that render the property compliant with prescribed building standards ... does not render the property unfit for the purpose for which it was purchased ...'*. In the *Odendaal* matter, transfer had not yet passed when the issues were raised.
- In the present matter, however, transfer had taken place already and the purchasers were given occupation of the property.

The essentialia of a sale

- The *essentialia* of an agreement of purchase and sale are: (i) mutual consent between the parties, (ii) identification of the thing to be sold and (iii) agreement on the price for which it is to be sold. In terms of the common law the seller further has an obligation to take care of the thing sold until it is handed over and then to make the thing available to the buyer and ultimately to transfer ownership. The seller is obliged to make available what was sold.
- This is indeed what was provided in the present matter: The executrix did all that was required of her as executrix, and the Werners received vacant possession. They received what they purchased.
- On the facts it was clear that the Werners did not have complaints about *what* they had purchased and there is no indication in the papers that they enquired about the occupancy certificate at the time of the sale or prior to taking transfer.
- There was therefore no obligation on the executrix to obtain an occupancy certificate and to furnish it to the Werners prior to the finalization of the estate, or at all, for that matter.