

WILFUL IGNORANCE LANDS PROPERTY SELLERS WITH LIABILITY FOR DAMP DAMAGES

Gortzen and Another v Moolman (A3022-2021) [2024] ZAGPJHC 1780 (28 February 2024)

Getting the home showroom ready, remaining wilfully ignorant of the obvious, and allowing reckless half-truths to prevail, all combined in this matter to render the sellers of a home liable to the purchaser for damages resulting from damp. This, in the context of sellers who were divorced: the ex-husband, having long vacated the marital home, left the ex-wife to deal with the agent and purchaser in the time leading up to the sale. As co-owner, however, the ex-husband had also completed the Property Condition Report. He was thus held jointly liable with his ex-spouse, having not mentioned the damp which, he argued, was patent (but having shared the costs of the painters who were tasked to “make the house look pretty” for purposes of putting it on the market).

The Summary can be viewed [here](#)

FACTS

Ms Moolman purchased a home from Mr and Mrs Gortzen. Some time before the sale to Moolman, Mr and Mrs Gortzen had divorced. Mr Gortzen had moved out of the house, while Mrs Gortzen stayed on until the eventual sale of the property.

Shortly before putting the house up for sale, Mrs Gortzen had mandated Limbika Coatings and Painters (“Limbika”) to attend to work on the property, in preparation for its sale. Limbika undertook certain repairs, primarily by patching and refilling cracks and marks in the paint, and re-painting. Mr Gortzen paid half the costs. This was the second time in the same year that she had the property repainted; the first time was just after Mr Gortzen had moved out.

The sale agreement confirmed that the property was sold voetstoots. It also contained a defects disclosure form (signed by Mr Gortzen), which stated that “the seller further confirms . . . that there are no latent defects in any of the following items unless likewise disclosed by placing a cross in the relevant blocks”. None of the items in the disclosure list was ticked as applicable, including the listed item “dampness in walls/ floors”.

After transfer, in planning for renovations to the property, Moolman discovered extensive damp in the property, which ultimately triggered these legal proceedings. Moolman sought a reduction of the purchase price, alternatively damages, as the Gortzens never disclosed the latent defect (damp) to her.

In January 2021 the Magistrates’ Court upheld the claim and ordered the Gortzens to pay Moolman R244 855.00, plus interest. The crisp issues before the Magistrates’ court were whether (one or both of) the Gortzens were liable for the cost of repairing the damp in and around the property, in light of the voetstoots clause in the sale agreement. To succeed in that claim, Moolman had to show that: (a) the damp constituted a latent defect that was not obvious or patent to her, (b) the Gortzens were aware of the defects and their consequences, and (c) they deliberately concealed it with the intention to defraud (*dolo malo*). The Magistrates’ Court found that Moolman had succeeded in proving these elements in respect of the damp, and accordingly upheld her claim against both sellers, jointly and severally. Mr and Mrs Gortzen each filed separate appeals to the High Court.

Mr Gortzen testified that he knew of the damp as it was readily apparent from a damp smell in the kitchen and bubbling paint in the dining room. It was therefore patent, not a latent, hidden defect for which he (as co-seller) could be held liable.

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Mrs Gortzen testified that she retained a number of contractors, including Limbika, to “beautify” the property in advance of marketing it for sale in the hope that, by neatening it up, they would sell the property quickly and fetch the best possible price; that she sought to put the house in “showroom condition”, not to conceal any defects; that she was ignorant of the damp and thus could not have sought to conceal it; and that, in any event, it was her husband who attended to maintenance during their marriage.

HELD

Latent or patent defect?

- The evidence showed that Limbika had been retained to repair imperfections in the paintwork after Mr Gortzen left the property. There was extensive need for Polyfilla, when regard is had to the amount of Polyfilla quoted for in Limbika’s invoice. Mrs Gortzen’s averment that they mainly did superficial paintwork, was therefore not accurate. In addition, Mr Gortzen never visited the property after he left and therefore could not testify whether the damp was visible to a purchaser inspecting the home immediately after the repairs were performed.
- It was so that Moolman, Mrs Gortzen and the estate agent all recorded that they were unaware of, and did not notice, bubbling paint or a damp smell when the property was on show. But this did not mean that there was no damp. Rather, this perception (at least on the side of the purchaser and the estate agent) tallied with the testimony of the experts on both sides who confirmed that damp may not be obvious to the untrained eye and without the use of measuring instruments.
- It was therefore clear that the defects were latent.

Knowledge of the defects

- Mrs Gortzen’s argument that she was not responsible for maintenance during the marriage, was not convincing. Her husband testified to the fact that it was noticeable (when not freshly painted over). Also, she required a second round of repairs within 12 months, the repairs having been made to the areas where the damp was subsequently found by the purchaser. These facts were consistent with repeated issues arising in respect of the state of the walls and the paint. It is improbable that she was unaware of the damp.

Concealment

- Mr Gortzen testified that he was aware of potential damp issues in the kitchen and dining room at the time he vacated the property in March 2013. He appears to have taken no steps to ascertain how extensive or serious those problems were – but a wilful abstention from establishing the true facts does not constitute a lack of knowledge.
- He was also the signatory to the Property Condition Disclosure Form, attached to the sale agreement. He recorded therein that there were no latent defects in the property (including damp in the walls/floors), despite his knowledge that his wife had repairs done shortly before the sale. He should have anticipated that what he thought was patent, may not have been visible to the purchaser.
- In addition, the facts showed that Mrs Gortzen can be presumed to have had knowledge of the damp problems in the house, despite her denial.
- Non-disclosure was therefore established.

Was the concealment wilful?

- On the facts and evidence, it was apparent that the concealment of the defect was wilful.
- In respect of Mr Gortzen who was no longer in the house, the wilfulness was evident from these facts: He was aware that Mrs Gortzen had engaged Limbika to undertake cosmetic repairs and repainting; that he shared the costs of their work; that he took no steps thereafter to establish whether the damp issues of which he was aware had been remediated, or whether they remained obvious to an ordinary buyer on inspection. He nevertheless failed to disclose the damp issues in the disclosure form, or raise their existence with the estate

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agent. This was sufficient to establish *dolo malo* on his part since “[w]here 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 appeal accordingly failed.

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