

SUMMARY OF THE JUDGMENT

CONSEQUENCES OF FRAUDULENT NON-DISCLOSURE IN A SALE AGREEMENT

Rossouw v Hanekom (741/2017) [2018] ZASCA 134 (28 September 2018)

This matter deals with an instance where a seller had fraudulently failed to disclose a defective roof and sewerage system and that he had not obtained municipal approval for alterations to the home. The purchaser was successful in a delictual claim for damages, based on the seller's fraudulent misrepresentation and fraudulent non-disclosure, the fraudulent actions trumping the voetstoets clause in the sale agreement.

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

FACTS

In February 2011, Ms Rossouw bought a property from Mr Hanekom. Shortly after Ms Rossouw and her family moved into the home, they discovered that there was a serious leak in the roof and that the drains were constantly blocked. Ms Rossouw subsequently also discovered that alterations had been made to the roof structure and sewage system without the required statutory building plan approval.

Ms Rossouw successfully sued Mr Hanekom in the Western Cape Regional Court for damages. Her claim was based on fraudulent misrepresentation (in respect of the roof) and fraudulent non-disclosure (in respect of the absence of statutory approval and the sewage system). Thus, her claim was founded on delictual liability and not on the implied warranty of a seller that the *merx* (the thing sold) is free of latent defects. (i.e. the claim was not based on the voetstoets clause in the deed of sale.)

Clause 25 of the deed of sale did provide for the (usual) acknowledgement by the purchaser that no representations had been made, but it is trite that it could not bar a claim based on fraudulent misrepresentations.

At the conclusion of the trial, the regional court found for Ms Rossouw. Mr Hanekom appealed to the Western Cape High Court, which court upheld the appeal. That court also granted special leave (to Ms Rossouw) to appeal to the Supreme Court of Appeal (the SCA).

The evidence considered by the SCA, were as follows:

- i. Mr Hanekom testified that he had effected alterations to the buildings on the

property which entailed the enclosure of an open area and creating three rooms - a 'braai room', the extension of a television room and a small lounge. A new roof structure that joined the house and the outbuilding followed. The pitch of the new roof formed a valley gutter with the mono-pitched roof of the outbuilding. The sewage pipes, gullies and manhole were covered by a concrete floor and ceramic tiles. The result of the alterations was that a major part of the sewage system was situated underneath the floor of the new rooms.

- ii. In terms of the National Building Regulations and Building Standards Act (the Act), the prior written approval of the relevant local authority was required for the construction of the alterations. For this purpose, building plans had to be submitted to the local authority and the latter may grant or refuse an application for approval only after consideration of the recommendation of a building control officer. In the present matter, building plans in respect of the alterations were only submitted to the local authority six days before the deed of sale was entered into. The building plans were somehow approved by the local authority during June 2011, but obviously on the basis that construction could then commence and would be subject to inspection. Only after inspection of the completed works would a certificate of occupancy be issued in terms of the Act.
- iii. The engineering expert witness of Ms Rossouw explained that the structure of the new roof was defective, causing progressive sagging of the new roof structure and leaking of the valley gutter. The plumbing expert testified also that he discovered that the main cause of the blockage was a collapsed pipe; that problem could however not be rectified because the manhole had unlawfully been covered by a concrete floor.
- iv. In order to obtain the permission of the local authority in terms of section 14 of the Act to occupy the house, Ms Rossouw had to replace the defective roof structure and to reroute the sewage line around the house. She claimed the costs of these measures as damages.
- v. Ms Rossouw pleaded that Mr Hanekom had represented to her that the leakages of the roof 'had been repaired and attended to and would accordingly no longer occur'. She also pleaded that, amongst other things, Mr Hanekom did not disclose that the alterations had not been approved by the local authority nor that the sewage system and manhole had been covered by a concrete floor during the alterations.
- vi. Ms Rossouw testified that prior to signing the agreement, she had viewed the property with the estate agent. On that occasion, Mr Hanekom's wife was present.

Whilst they moved through the house, the estate agent simply said, in passing, that the leak in the braai room had been fixed and this was confirmed by Mrs Hanekom. Ms Rossouw testified that this was the only information that had been conveyed to her and her husband in respect of the roof prior to the deed of sale. Both testified that nothing had been said about the absence of approval of building plans in respect of the alterations or the covering of the sewage system.

- vii. In his evidence, Mr Hanekom acknowledged that the leaking roof had been a problem for a long time and also that he knew that the repair work he commissioned in January 2011 would not address the cause of the sagging of the roof structure. On his own evidence, he had no honest belief at the time of the deed of sale that the leaking roof had been fixed. He also knew that he was obliged to obtain the prior approval of the local authority for the alterations, but ascribed his failure to do so to financial distress. He knew full well, of course, that the sewage system and manhole had been covered by a concrete slab. Mr Hanekom however testified that he specifically instructed the estate agent to inform potential buyers that the roof had leaked; that waterproofing work had been done; that a 12 month guarantee had been given in respect of that work; but that the effectiveness of the work could only be determined during the coming rainy season. He said that he also instructed the agent to disclose that building plans in respect of the alterations had not been approved.
- viii. The agent testified that she informed Ms Rossouw during the negotiations that the roof leaked because the gutter was too small, but that it had been replaced and that there was a warranty in respect of that work. However, in contradiction of the evidence of Mr Hanekom, she said that it was Mr Hanekom who personally fully explained the situation with the leaking roof to the Rossouws prior to the deed of sale. She denied that she had been instructed to disclose that building plans in respect of the alterations had not been approved. During cross-examination however, she accepted that the aforesaid evidence of Ms Rossouw in respect of what had been said about the roof was correct.

HELD:

- On the accepted evidence of Ms Rossouw, it was conveyed to her that the roof had been repaired and was no cause for concern. This was manifestly a material misrepresentation of the true facts. The case in respect of the non-disclosure was that Mr Hanekom did not disclose that building plans in respect of the alterations had not been approved nor that the sewage system and manhole had been buried under a concrete floor.

- In addition, Mr Hanekom acknowledged that he was obliged, personally or through his agent, to convey the full facts in respect of the leaking roof to Ms Rossouw. He also rightly accepted that he was obliged to disclose the absence of statutory approval in respect of the alterations. The same must apply to the covering of the sewage system and manhole. This was a serious matter directly linked to the absence of statutory approval. On the accepted evidence, Mr Hanekom and his agent materially misrepresented the true position in respect of the roof and failed to disclose matters that would clearly play a crucial role in Ms Rossouw's decision to acquire the property or not.
- In all the circumstances, the most probable inference is that the misrepresentation and non-disclosures were made deliberately in order to induce the sale. This constituted fraud.

Ms Rossouw had accordingly proved her case on the merits and the appeal succeeded.

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