THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 741/2017

In the matter between:

ESTELLE ROSSOUW **APPELLANT**

and

JACOBUS PETRUS HANEKOM **RESPONDENT**

Neutral citation: *Rossouw v Hanekom* (741/2017) [2018] ZASCA 134 (28 September 2018)

Coram: Lewis, Tshiqi and Van der Merwe JJA and Mothle and Nicholls AJJA

Heard: 6 September 2018

Delivered: 28 September 2018

Summary: Contract – claim for damages – fraudulent misrepresentation and non-disclosure established.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Savage and Cloete JJ sitting as court of appeal):

1 The appeal is upheld with costs.
2 The order of the high court is set aside and replaced with the following:
'The appeal is dismissed with costs.'

JUDGMENT

Van der Merwe JA (Lewis and Tshiqi JJA and Mothle and Nicholls AJJA concurring)

[1] On 12 February 2011 the appellant, Ms Estelle Rossouw, entered into a deed of sale with the respondent, Mr Jacobus Petrus Hanekom. In terms thereof, Mr Hanekom sold the property known as erf 1131, 22 De Vos Street, Strand (the property) to Ms Rossouw. Shortly after Ms Rossouw and her family moved into the house on the property, they discovered that the roof leaked seriously 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 approval.

[2] Ms Rossouw consequently sued Mr Hanekom in the regional court of the Western Cape for damages in the amount of R232 017. 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 is free of latent defects. Therefore, the voetstoots clause in the deed of sale was inapplicable. However, clause 25 of the deed of sale did provide for an

acknowledgement that no representations had been made to Ms Rossouw, but it is trite that it could not bar a claim based on fraudulent misrepresentations. See GB Bradfield *Christie's Law of Contract in South Africa* 7ed at 587 and 340. At the commencement of the trial, the regional court (Ms C M Nziweni) by agreement made an order separating the issues in respect of the merits and the quantum of the claim. The trial proceeded only on the merits of the claim.

[3] Ms Rossouw and her husband testified in her case. She also called two expert witnesses, namely Mr JH Burger (an engineer) and Mr J Ligthart (a plumber). After an application for absolution from the instance at the end of Ms Rossouw's case had been refused, Mr Hanekom testified. He called the estate agent that he had mandated to sell the property, Ms Chrisna Scheepers, as a witness. At the conclusion of the trial the regional court found for Ms Rossouw. It declared that Mr Hanekom was liable to pay such damages resulting from the fraudulent misrepresentation and non-disclosure as Ms Rossouw may prove. It also directed Mr Hanekom to pay costs, including the fees of counsel (on the regional court scale) and of the expert witnesses.

[4] Mr Hanekom appealed to the Western Cape Division of the High Court, Cape Town. The court (Savage J, Cloete J concurring) upheld the appeal with costs. It set aside the order of the regional court and replaced it with the following:
'*The defendant's application for absolution from the instance is granted with costs, including the costs of one counsel, on the Magistrate's Court scale.'*
This court subsequently granted special leave to appeal to Ms Rossouw.

[5] It appeared from the evidence that, during the period from 2005 to 2008, Mr Hanekom effected alterations to the buildings on the property. Prior to these alterations, there was an open area between the house and a freestanding outbuilding containing a garage and other rooms. The sewage system was routed through that open area. This included a manhole. The sewage pipes from a bathroom and toilet in the house and a toilet and scullery in the outbuilding were directed through the manhole.

[6] The alterations entailed the enclosure of the open area by the creation of three new rooms. These were referred to as a ‘braai room’, the extension of a television room and a small lounge. The new roof structure that joined the house and the outbuilding followed the pitch of the roof of the house and 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. Although a rodding eye was inserted at the back of the house, the result of the alterations was that a major part of the sewage system was situated underneath the floor of the new rooms.

[7] In terms of the National Building Regulations and Building Standards Act 103 of 1997 (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 in terms of s 4 of the Act. Section 7 of the Act provides that the local authority may grant or refuse an application for approval only after consideration of the recommendation of a building control officer. Building plans in respect of the alterations were only submitted to the local authority on 6 February 2011, some 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.

[8] In his evidence, Mr Burger explained that the structure of the new roof was defective. There was inadequate connection detail between the new sloping roof structure and the existing outbuilding. A laminated beam across the opening between the existing television room and the extension thereof, leaned over and twisted considerably under the load of the new roof structure. All of this caused progressive sagging of the new roof structure and leaking of the valley gutter.

[9] The new rodding eye proved to be of no use in opening the severely blocked sewage system. As a result, the manhole and sewage pipes had to be uncovered. This required the removal of the concrete floor in the braai room and the extension of the television room. Mr Ligthart testified that he discovered that the main cause of the blockage was a collapsed pipe some 300 to 400 millimeters down the sewage

line from the manhole. However, the self-evident defect was that that problem could not be rectified because the manhole had unlawfully been covered by a concrete floor.

[10] In order to obtain the permission of the local authority in terms of s 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.

[11] 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, *inter alia*, 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.

[12] In her testimony Ms Rossouw said that prior to the deed of sale she had viewed the property with Ms Scheepers. On that occasion, Mr Hanekom's wife was present. Whilst they moved through the house, Ms Scheepers simply said, in passing, that the leak in the braai room had been fixed and this was confirmed by Ms 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. Mr Rossouw confirmed this in his evidence. 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.

[13] In his evidence, Mr Hanekom acknowledged that the leaking roof had been a problem for a long time. He said there had been many unsuccessful attempts to fix that problem. When he went onto the roof, he personally observed that rainwater collected in the middle of the valley gutter and did not run off. During January 2011 he was specifically informed as follows by a building contractor, Mr Ramos:

'The main issue seems to be the trusses and supports that have sagged in the middle causing the water to sit in the middle and not flow properly. With a heavy rain it will sit and overflow right above the lounge.'

Mr Hanekom knew, however, that the work that he contracted Mr Ramos to do during 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. (See *Banda & another v Van der Spuy and another* [2013] ZASCA 23; 2013 (4) SA 77 (SCA) para 22). He 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.

[14] Mr Hanekom testified that he specifically instructed Ms Scheepers 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 Ms Scheepers to disclose that building plans in respect of the alterations had not been approved.

[15] Ms Scheepers 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 what was put to the Rossouws and of the evidence of Mr Hanekom, she then 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 she accepted that the aforesaid evidence of Ms Rossouw in respect of what had been said about the roof, was correct.

[16] The trial court analysed the evidence and concluded that the evidence of the Rossouws was credible and had to be accepted. It rejected the evidence of Mr Hanekom and Ms Scheepers that conflicted with that of the Rossouws. There is no reason to interfere with these findings. On the contrary, they were fully justified by the record.

[17] Regrettably, the high court failed to properly apply itself to the issues and the evidence. It showed no appreciation of the trite principle that it was bound by the trial court's findings of credibility, unless they were found to be affected by material misdirection or to be clearly wrong. The court a quo also held that, on her own

evidence, Ms Rossouw did not prove that it had been conveyed to her that the leakages of the roof would no longer occur. This displayed a formalistic and unrealistic approach. 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 court a quo completely misunderstood Ms Rossouw's case in respect of the non-disclosures. Her case 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. It was common cause that none of this had been disclosed. Finally, it should be said that the substitution of the order of the trial court with an order of absolution from the instance at the end of Ms Rossouw's case, despite the fact that both Mr Hanekom and Ms Scheepers testified in his case, is incomprehensible.

[18] 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. The regional court correctly found that Ms Rossouw had proved her case on the merits.

[19] For these reasons the appeal must be upheld. The following order is issued:

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following:

'The appeal is dismissed with costs.'

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C H G van der Merwe

Judge of Appeal

APPEARANCES

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