

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: A3022/2021
Magistrates Court Case No: 557/2016

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO


Acting Judge Goodman

In the matter between:

JAN-NIS GORTZEN

FIRST APPELLANT

KATJA HANNA GORTZEN

SECOND APPELLANT

and

ARDYN MERYL MOOLMAN

RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 28th of FEBRUARY 2024.

Summary: Appeal against award of damages for non-disclosure of defects – applicability of voetstoots clause – joint and several liability – appeal dismissed with costs.

GOODMAN AJ (ET DIPPENAAR J CONCURRING)

INTRODUCTION

- [1] This appeal arises out of a claim, brought by the respondent, for a reduction of the purchase price, alternatively damages, arising from undisclosed defects in the property that the respondent had bought from the appellants – namely, damp in the internal and external walls of the property, as well as a crack in the swimming pool. The respondent also sought the return of certain specified fixtures that she said had been improperly removed from the property prior to transfer.
- [2] On 27 January 2021, the Roodepoort Magistrates Court (“the court *a quo*”) upheld the respondent’s claim in respect of damp (but not the swimming pool or the fixtures), and directed the first and second appellants, jointly and severally, to pay the respondents an amount of R244 855.00, plus interest, as well as the costs of suit, in respect thereof.
- [3] The appellants each appeal the judgment and order insofar as it applies to them. They were separately represented both in the court *a quo* and in this Court, and their grounds of appeal differ. The respondent did not cross-appeal, meaning that the damp claim is the only issue subject to appeal.

LAPSING OF THE APPEAL

- [4] At the outset, the respondent objected that the appeal had lapsed, and ought to be dismissed on that basis alone. That, it was submitted, was because the appeal had not been timeously prosecuted, within the meaning of Rule 50(1) of the Uniform Rules.

- [5] Rule 50(1) requires that an appeal be “*prosecuted*” within 60 days after it has been noted. To prosecute the appeal, an appellant must lodge two copies of the record with the registrar¹ and apply, in writing, on notice to all parties, for a hearing date for the appeal.² The registrar may not assign a hearing date unless the record has been filed in compliance with Rule 50(7).³
- [6] It is common cause that the respondents in this case timeously noted an appeal, and then lodged a record and applied for a set down date within the requisite period. But the respondent submits that the record lodged did not comply with Rule 50(7), both because it was not properly indexed and paginated and because it was incomplete. That was claimed to be clear from the issues raised in the July 2022 directive of Adams J, which required certain corrections to be made to the record before the matter could be heard. According to the respondent, it meant that the provisions of Rule 50(5) and (7) had not been complied with in the 60-day period and the appeal had therefore lapsed. There is, moreover, no adequate explanation for the delay in setting the appeal down after the record had been corrected and re-lodged. On either basis, the respondent submits that the appeal lapsed.
- [7] The appellants submit that a complete record *was* timeously lodged, and that Adams J merely required extraneous material to be excised, documents to be paginated and bundled in a manner that accorded with the requirements of Caselines, and for practice notes to be updated to refer to the relevant parts. The appeal consequently had to be removed from the roll, and revised heads of argument submitted, as well as papers in the condonation application exchanged, before it was ripe to be set down again. They accordingly submitted that the appeal had been timeously prosecuted and had not lapsed, but they nevertheless sought condonation to the extent that it had.

¹ Rule 50(7)
² Rule 50(4)
³ Rule 50(5)(b)

[8] While the July 2022 directive identifies certain flaws in the manner in which the record was presented to the Court and referred to in the parties' practice notes, it did not find the record to be defective, nor did it strike the appeal from the roll for non-compliance with the Rules. Instead, Adams J afforded the parties an opportunity to remedy any defects. We cannot, in those circumstances, find that the appeal lapsed for non-compliance with Rule 50. Nor should the appellants be non-suited for their failure to set the matter down more swiftly after it had been removed from the roll. Their explanation for the time taken in this regard is reasonable, and provides good cause for the delay. In any event, it was open to the respondent herself to seek to set the appeal down, if she considered it ripe. Having failed to do so, she cannot succeed in a complaint that the appeal has lapsed by virtue of delay.

MERITS

[9] The basic background facts to the matter were common cause.

[9.1] The first and second appellants had jointly acquired and owned the property at issue during their marriage. Their relationship subsequently soured, and the first appellant moved out of the property in March 2013. The appellants later agreed to sell the property as part and parcel of their divorce settlement. That agreement provided, inter alia, that if the property was not sold by 1 November 2013, the appellants would be obliged to accept an offer R200 000 less than their initial asking price.

[9.2] In late August or early September 2013, the second appellant (who had remained in occupation of the property) retained Limbika Coatings and Painters ("Limbika") to attend to work on the property, in preparation for its sale. Limbika are painting contractors, and they undertook superficial repairs of the property – primarily by patching and refilling cracks and marks in the paint, and re-painting. The property was put on show shortly thereafter.

[9.3] The respondent viewed the property a few times during October 2013 and made an offer to purchase the property on 29 October 2013. A sale agreement was concluded between her and the first and second appellants on 3 November 2013. It included a voetstoots clause. It also contained a defects disclosure form, which stated “*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 checked, including the listed item “*dampness in walls/ floors*”.

[9.4] The respondent paid the full purchase price during December 2013. Transfer was effected in late February 2014, and the respondent was given the keys to the property on 4 March 2014. In planning for renovations to the property, she discovered damp, triggering the present proceedings.

[10] The crisp issue before the court *a quo* was whether (one or both of) the appellants were liable for the cost of repairing damp in and around the property, in light of the voetstoots clause in the sale agreement. To succeed in that claim, the respondent had to show that: (a) the damp constituted a latent defect that was not obvious or patent to the respondent, (b) the appellants were aware of the defects and their consequences, and (c) they deliberately concealed it with the intention to defraud (*dolo malo*).⁴ The court *a quo* found that the respondent had succeeded in proving each of these elements against both of the appellants in respect of the damp, and accordingly upheld her claim against both of them, jointly and severally.⁵

⁴ Odendaal v Ferraris 2009 (4) SA 313 (SCA) para [29]; Banda and Another v Van der Spuy and Another 2013 (4) SA 77 (SCA) para [2]

⁵ Judgment, para 7.

Latent or patent defects

[11] The first appellant took issue with the court *a quo*'s findings on the first element – that is, that there was in fact damp across the property, and that this constituted a latent defect amenable to claim. The first appellant's version was that he was aware of damp in only two areas, the kitchen and dining room, but that this was readily apparent from a damp smell in the former and bubbling paint in the latter. Because those issues were patent, a claim in respect thereof was excluded by the *voetstoots* clause.⁶

[12] The court *a quo*'s finding that there was damp in and around the property cannot be gainsaid. It was agreed between the respondent's expert, Mr Bruckner, and the second appellant's expert, Mr Gowans, that the interior walls of the garage, the entrance hall and the windows by the water feature, the entire perimeter wall, the west side exterior wall, and the columns were affected by damp. This damp qualified as a defect because it affected the use and value of the property.⁷

[13] The court *a quo* also cannot be faulted for finding that the damp was latent.

[13.1] In relation to the bubbling paint, Limbika had been retained to repair imperfections in the paintwork after the first appellant left the property. On his own version, the first appellant did not attend at the property in the period after Limbika undertook its work and before the sale agreement was concluded. He consequently could not attest to the state of the property at the time that the respondent saw it, and could not confirm that the bubbling paint or the damp smell were still present at the time the property was sold.

⁶ See Odendaal para [35], confirming that a buyer who has an opportunity to inspect the property before purchase will not generally have a claim in respect of patent defects.

⁷ See Odendaal para [25]; *Dibley v Furter* 1951 (4) SA 73 (C) at 81A - 82E.

[13.2] The second appellant, the respondent and the estate agent all record that they were unaware of, and did not notice, bubbling paint or a damp smell when the property was on show. That tallies with the testimony of both experts who confirmed that damp may not be obvious to the untrained eye and without the use of measuring instruments.

[13.3] For his part, Mr Gowans did not accept that there was any actionable damp in the dining room. If no damp was obvious to an expert damp- and waterproofer even after inspection, it could not have been patent to a layperson buyer at the time of purchase.

[13.4] Indeed, the only person who confirmed that there were flaws in the dining room paintwork was Mr Bruckner. The second appellant's counsel, Ms De Wet, argued that it reflected poorly on his credibility and that his testimony on this score was at odds with that of the other witnesses. But that does not follow. Mr Bruckner stated that the flaw in the paintwork was only visible from certain angles, due to the recent paint work. It may therefore have been obvious only under careful scrutiny by a trained eye. Moreover, Mr Bruckner inspected the property some 5 months after the sale was concluded. Both experts testified that the state of the paintwork would deteriorate over time as a consequence of the underlying damp issue. Mr Sayenda of Limbika also confirmed that if a damp area were to be repaired with Polyfilla, it would only hold for a limited period of time and would then "*begin to fall apart*". Mr Gowans' evidence was to the same effect. In this context, the flawed paintwork identified by Mr Bruckner could have arisen only in the intervening period (i.e. between the date of sale and the date of inspection). Contrary to the second appellant's claims, there is nothing inherently unreliable about his evidence in this regard.

[14] The evidence thus does not support the first appellant's claim that the defects were apparent. His grounds of appeal on this score must fail.

[15] The second appellant accepted that damp constituted a latent defect in the property but took issue with the extent of the damp claimed for – particularly in relation to the balcony repairs. It was submitted that Mr Bruckner was the only witness who could (and did) testify to the need for repairs to the balcony, and he based his assessment on leaks apparent in the kitchen ceiling, in respect of which no photographs had been provided. It was further argued that Mr Bruckner’s evidence should be treated with circumspection, both because he received a commission on the work undertaken and thus had an interest in defending its extent, and because he had a relationship with the respondent that meant he was not independent. Mr Gowans, by contrast, was independent but he had only been afforded access to inspect the property after remediation work had commenced – and after the balcony tiling and waterproofing had been removed. He was thus unable to assess whether the balcony was indeed leaking, and whether the repairs undertaken were in fact required.

[16] The court *a quo* accepted Mr Bruckner’s evidence on the extent of the damp and the flaws in the balcony. It cannot be faulted for doing so, for the following reasons:

[16.1] First and foremost, whilst the experts were at odds on the extent of the damp across the interior walls of the property,⁸ they agreed that there was no threshold step between the balcony and the interior, and that this could result in water ingress resulting in damp or wetness in the walls. They disagreed on the best method for remedying that issue – but not on the fact that the balcony structure could cause or contribute to damp in the interior walls. That evidence bore out the respondent’s case for defects arising from the balcony.

⁸ In particular, they did not agree on whether the downstairs guest bedroom, open plan lounge, TV room and kitchen were affected by unacceptable levels of damp. They also disagreed on whether the damage to the bamboo flooring adjacent to the balcony was caused by the balcony leak – but the respondent excluded the repairs to the bamboo floor from her claim and so this issue was irrelevant.

[16.2] Second and in any event, it was not put to Mr Bruckner, let alone established, that he lacked independence or credibility. Both his testimony, and that of the respondent, confirmed that he had previously undertaken work for the respondent, but their evidence did not point to a sufficiently close relationship that it would compromise his independence or the truthfulness of his testimony. That also cannot be inferred from the fact that Mr Bruckner received 10% of the fees charged for the repairs. The work was completed and paid for in advance of the trial, so his payment was not contingent on its outcome.

[16.3] Third, the timing of Mr Gowans' inspection of the property does not support the inference contended for – namely, that the repair work was begun with unseemly haste to frustrate the appellants' ability to inspect the property or dispute the defects claimed. Mr Bruckner first attended the property and quoted for repairs on about 6 March 2014. Pursuant to his report, the respondent's attorneys wrote to the appellants on about 18 March 2014, calling upon them to inspect the property and tender to repair the identified defects within 7 days, failing which the respondent would herself attend to the repairs and seek to recover the costs thereof from the appellants. Follow-up letters were sent on 26 March 2014 and 4 April 2014, recording also that the respondent's occupation of the property would be delayed by the repairs and that they were consequently urgent. On 15 April 2014 – almost a month after the initial letter – the respondent's attorneys notified the appellants that work had commenced at the property. Mr Gowans inspected the property on about 5 May 2014, by which stage work was already well underway. There is insufficient basis, on the evidence, to impute bad faith to the respondent in respect of the timing of the repair work.

[17] In all those circumstances, the second appellant's grounds of appeal in respect of this element must also fail. The court *a quo*'s finding that the damp was a latent defect in respect of which a claim could be brought, cannot be faulted and must stand.

Knowledge and concealment of the defects

[18] Both appellants disputed that they were aware of the defects at issue, and that they concealed them from the respondent. In this Court, they appeal the court *a quo*'s findings to the contrary.

[19] The second appellant's position was that, during the pendency of her marriage, she was not responsible for the maintenance of the property. It was attended to by the first appellant. He had not apprised her of either the bubbling paint in the dining room or the damp smell in the kitchen. She was consequently wholly unaware of any damp issues in or around the property – a position she submitted was consistent with the experts' evidence that damp can go undetected for years. The second appellant also 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, the appellants would sell the property as quickly as possible and fetch the best possible price. It is commonplace for sellers to do so. She sought to put the house in "*showroom condition*", not to conceal any defects. Because she was herself ignorant of the damp, she could not have sought to conceal it.

[20] The court *a quo* found, on a balance of probabilities, that the second appellant had known of the damp and had designedly concealed it during the sale. While fraud is not lightly imputed,⁹ it may nevertheless be inferred when such inference is supported by the objective facts revealed by the evidence.¹⁰ The court *a quo*'s inference on that score was justified on the following facts:

[20.1] The evidence of Mr Bruckner was that the extent of damp in the property would have led to paint peeling within the two years prior to September 2013, and would have required repair.

⁹ Odendaal para [29]

¹⁰ Banda para [11] and the cases cited therein.

[20.2] The appellants had undertaken renovations on the property in 2010. The second appellant had painted certain areas of the house again in early 2013, when the first appellant moved out. The house nevertheless, on her version, required re-painting again in September 2013 because certain areas were looking “tatty”. These facts are consistent with repeated issues arising in respect of the state of the walls and the paint. It is improbable that the second appellant was unaware of the damp, given these facts.

[20.3] The cost of “*beautifying*” the property came to R41 747.09. Limbika’s work was, of itself, relatively extensive. Its quote and Mr Sayenda’s testimony were to the effect that the ceilings, the staircase, the children’s bedrooms, the passage, the entrance, the patio, the study and the study passage, the guest toilet, the pillars around the staircase, the kitchen, the lounge windows and window frames, parts of the TV room, and the doorway into the garage, among others, were repaired and/or repainted.

[20.4] Both the second appellant and Mr Sayenda testified that Limbika was contracted to re-paint the house (not to undertake repairs), and that the second appellant pointed out and delineated the particular areas that were to be re-painted. Mr Sayenda stated that he did not note any areas of damp but confirmed that the plaster and paint was uneven and/or cracked in the identified internal areas, certain plugpoints and skirtings were loose or uneven, and the plaster on the exterior walls was lumpy and uneven. In respect of the internal walls, he sanded them down, and used Polyfilla, or a mixture of Polyfilla and plaster key, to skim them and make them smooth, before painting over. For the plugpoints and skirtings, he filled any gaps with silicone, and then skimmed and painted. He could not use Polyfilla on the external walls because the flaws ran too deep and had to be replastered. He nevertheless smoothed and repainted them as best he could.

[20.5] Receipts indicated that one drum of paint, and 24 kgs of Polyfilla, were purchased for Limibika's repairs. It was not clear from Mr Sayenda's evidence what area this would have covered, but Mr Bruckner testified that this indicated a lot of repair relative to the amount of paint purchased. Moreover, Mr Bruckner observed damp in the very areas where "*a major amount of Polyfilla*" had been used. Mr Sayenda's evidence of the areas that had been repaired with Polyfilla also conformed to the areas in respect of which the respondent claims. Mr Gowans conceded that because damp can manifest through peeling or irregular paint, new paintwork would indeed make damp harder to detect.

[21] The evidence thus shows that the second appellant caused extensive but cosmetic repairs to be undertaken to the very areas that were subsequently established to be damp very shortly before the property was put on sale, with the effect that such damp would be difficult, if not impossible, to detect – but disclosed neither the underlying issues nor the repairs to the buyer. This is consistent with an inference that she knew there to be an issue in those areas, and sought actively to conceal it, so as to market the property as favourably as possible. At best for her, she remained willfully ignorant of the underlying cause of the issues in the paintwork; she could not honestly have believed that the core issue had been remediated.¹¹ The court *a quo*'s finding that her conduct was *dolo malo* cannot be faulted.

[22] It is true, as contended for on behalf of the second appellant, that there is no evidence that she knew of the structural flaws in the balcony. But that does not absolve her of liability. If she was aware of the fact of the defect – that is, the damp – and concealed it, she is liable. That she was unaware of one or more of the causes of such defect matters not.¹²

[23] Insofar as the first appellant is concerned, he testified that he was aware of potential damp issues in the kitchen and dining room at the time he vacated the

¹¹ See, by analogy, Banda para [21]-[22]

¹² Banda para [24]

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.¹³ The court *a quo* was thus justified in finding the first appellant knew of the defects at issue.

[24] The first appellant signed off on the disclosure form in the sale agreement which recorded no latent defects in the property (including damp in the walls/floors) – so, non-disclosure is also established. The question is whether this amounted to wilful concealment on the first appellant’s part, given his evidence that he believed the damp issues to be patent. In this regard, the first appellant’s own evidence shows that he was aware that the second appellant had engaged Limbika to undertake cosmetic repairs and repainting, that he shared the costs of their work, but 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 agent. I am satisfied that this is 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”.¹⁴ The court *a quo*’s findings against him therefore cannot be faulted and must stand.

Quantum

[25] Finally, the second appellant appealed the extent of the damages awarded contending that:

¹³ Banda para [20], quoting R v Myers 1948 (1) SA 375 (A) at 383.

¹⁴ Odendaal para [29] citing Christie The Law of Contract in South Africa 5 ed (2006) at p 295; Van Der Merwe v Meades 1991 (2) SA 1 (A) at 8E-F.

[25.1] The respondent had failed to prove that knowledge of the damp would have affected the price paid for the property – particularly since she intended to repaint the property in any event;

[25.2] The cost of the balcony repairs ought to have been excluded because neither knowledge nor concealment had been established in respect thereof;

[25.3] The cost of roof repairs should similarly have been excluded, both because this was general maintenance and because the need for roof maintenance was patent;

[25.4] The cost of the French drain should have been excluded because its need was not established; and

[25.5] The cost of the repairs charged for the interior and exterior walls, and the windows, should not have been allowed because Mr Gowans did not have a proper opportunity to assess the extent of the damage and consequently the reasonable cost of repair.

[26] The measure of damages for an undisclosed latent defect is the difference between the price that the respondent paid for the property, and the price that she would have paid for the house had she been aware of the damp. The estate agent testified that she sells high-end properties with damp and that does not affect their price because a buyer is willing to assume the cost of repair. But that cannot be inferred here: the respondent was assiduous in procuring that the appellants repaired minor snags in the property when she discovered them; and it is inconceivable that she would not have factored extensive repairs required to address damp in the property into her offer price.

[27] Where no evidence is led as to the market price of the house with its defects, the court is entitled to fix damages at the sum for which the property could have been restored. The cost of repairs is thus a permissible measure of the award

to be made.¹⁵ The court *a quo* was thus entitled to use Virtua's invoice, evidencing the actual cost of repairs, as the basis for its award.

[28] Insofar as the items claimed for are concerned: the defect complained of was the damp that manifested in interior and exterior walls across the property. It was caused both by rising damp, and by water flowing down into the walls due to failed waterproofing. The respondent was required to prove knowledge and concealment of that defect – not of the underlying causes thereof. But she was entitled to be reimbursed the reasonable cost of remediating the defect, which necessarily includes attending to the various causes thereof (whether known to the appellants or not). As set out above, that required, among others, repairs to the balcony to remediate the risk of water ingress resulting from the low threshold step, and repairs to the waterproofing on the roof. Mr Bruckner testified that the French drain was necessary to prevent future rising damp along the exterior perimeter wall. Mr Brachner of Virtua (which undertook the repairs) confirmed that all of the costs claimed for were “*effectively to remedy the damp . . . remedy the waterproofing*”.

[29] Mr Gowans' testimony was to the effect that he was unable to confirm that these repairs were necessary and, in his view, some of the work could have been done differently and would have cost less. But that does not establish that the costs of repairs actually incurred were unreasonable. In those circumstances, the respondent was entitled to recoup them.

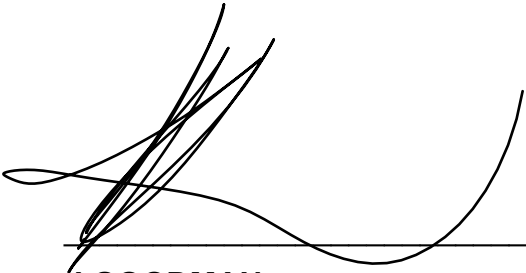
CONCLUSION

[30] In the circumstances, the appellants have failed to establish a basis for overturning the court *a quo*'s judgment and order. There is no reason to deviate from the ordinary rule that costs follow the result.

¹⁵ Banda para [25], citing *Labuschagne Broers v Spring Farm (Pty) Ltd* 1976 (2) SA 824 (T)

[31] In the result, the following order is made:

The appeal is dismissed with costs jointly and severally against the first and second appellant, the one paying the other to be absolved.



**I GOODMAN
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 1 FEBRUARY 2024
DATE OF JUDGMENT	: 28. FEBRUARY 2024
FIRST APPELLANT'S COUNSEL	: Adv. M. Rourke
FIRST APPELLANT'S ATTORNEYS	: JWL Attorneys
SECOND APPELLANT'S COUNSEL	: Adv. L. De Wet
SECOND APPELLANT'S ATTORNEYS	: Fick-Haupt Inc. Attorneys
RESPONDENT'S COUNSEL	: Adv. S. Cliff
RESPONDENT'S ATTORNEYS	: Schindlers Attorneys