REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 08/5489

DATE:23/09/2011

NOT REPORTABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between -

RAYMOND BANDA 1ST PLAINTIFF

PATRICIA FYNN 2ND PLAINTIFF

and

FRANK JOHANNES VAN DER SPUY 1ST DEFENDANT

ALICIA ANASTATSI VAN DER SPUY 2ND DEFENDANT

JUDGMENT

BORUCHOWITZ J

INTRODUCTION

[1] In terms of a written agreement entered into on 4 May 2007 the plaintiffs purchased from the defendants a fixed property situate at 14 Gunter Street, Villiersdorp, Western Cape, for the sum of R1 240 000.00. The plaintiffs duly paid the purchase price and the property was transferred to them on 7 November 2007.

[2] The dwelling on the property has a thatch roof. The plaintiffs allege that when the sale was entered into the defendants were aware and failed to disclose to them, that the roof suffered from material latent defects that caused it to leak. In paragraphs 9.1 to 9.5 of the particulars of claim it is alleged that the defects included the following:

(1) The pitch of the thatch roof varied between 30 and 40 degrees, whereas the minimum pitch required in order to keep the thatch waterproof and to avoid excessive decomposition of the thatch was 45 degrees;

(2) Reinforcing wire required to bind the thatch was absent, alternatively inadequate;

(3) No edge purlins were installed;

(4) The laths were spaced too far apart; and

(5) The design of the roof structure was inadequate.

[3] The plaintiffs claim payment from the defendants of the sum of R449 499, together with interest and costs.

[4] The claim is premised on a number of alternative bases. The main claim is for the reduction of the purchase price of the property based upon the *actio quanti minoris*, alternatively for payment of damages arising from a breach of the warranty to which reference is made in paragraph 8 below. It alleged that the defendants fraudulently, and with the intent to induce the plaintiffs to enter into the agreement, failed to inform them of the continued existence of the defects, and that accordingly they are entitled to a reduction in the purchase price equivalent to the reasonable cost of remedying the defects. Alternatively, it is alleged that such failure to inform the plaintiffs constitutes a breach of the warranty, entitling the plaintiffs to damages in such sum.

[5] The alternative claim is for delictual or contractual damages flowing from an alleged fraudulent or negligent misrepresentation. The claim is founded on the following allegations: That prior to signature of the agreement on 4 May 2007, the defendants and their agents represented to the plaintiffs that they were in possession of a written guarantee issued, regarding the soundness of the roof and that the defects that had been rectified. The representations were false in that no written guarantee was in place and the

defects had not been repaired. The representations were fraudulently or negligently made, and in fact induced the plaintiffs to enter into the agreement. The plaintiffs entered into the agreement believing the representations to be true and have accordingly suffered damages.

[6] In a further alternative claim it is alleged that on 25 July 2007 the parties entered into a written addendum to the sale agreement in terms of which the plaintiffs waived the suspensive condition contained in clause 15 of the main agreement and agreed to transfer the written guarantee from the roofing contractor to them. Prior to entering into the addendum the defendants represented to the plaintiffs that a valid guarantee was in place but knew this was not true. In consequence of the representation they were induced to enter into the addendum and therefore claim damages in the aforementioned amount.

[7] In their plea the defendants deny liability. They specifically deny that the roof has defects as alleged, or that they made any fraudulent or negligent misrepresentation as contended for. They plead that before the agreement of sale was entered into they disclosed and handed all documentation to the plaintiffs in respect of a prior incident where a leak in the roof occurred during an exceptionally heavy rainstorm in 2006. The roof was repaired and the repairs were guaranteed by the contractor. They also plead that the property was sold *voetstoots* and that they are excused from liability in respect of the

alleged latent defects in accordance with the provisions of clause 1 of the agreement.

[8] Four witnesses testified on behalf of the plaintiffs, namely the first plaintiff, Mr Raymond Banda; Mr Patrick Adam Braaf, the thatcher who had effected repairs to the roof; Ms Yvonne Spreeth, an estate agent in Villiersdorp and Mr Abraham Visagie, a structural engineer and expert in thatch roofs. The first defendant, Mr Frank Johannes Van der Spuy and his brother, Roelof Van der Spuy, are the only witnesses called in support of the defendants' case. I will refer to the their evidence when dealing with the specific issues in dispute.

MAIN CLAIM

[9] Clause 1 of the agreement provides as follows:

> "The seller warrants that as at the date of acceptance of this offer there are no latent defects in the property known to the seller and that save for this, the property is sold voetstoots … "

[10] The clause is unusually worded. It incorporates both an express warranty in respect of "*latent defects in the property known to the seller*", as also a *voetstoots* provision. To facilitate a proper understanding thereof it is necessary to refer to the relevant common-law principles.

[11] The position at common law is that in the absence of agreement to the contrary, a contract of sale ordinarily imports an implied warranty against latent defects. In terms of such warranty a seller is liable for any latent defects in the thing sold which either destroy or substantially impair its utility or effectiveness for the purpose for which it was sold or for which it is commonly used. The existence of a latent defect entitles the purchaser to rescission of the contract and repayment of the purchase price against return of the thing sold, or to a reduction of the price corresponding to the diminution of its value owing to the latent defect. These are the so-called Aedilitian actions.

[12] A purchaser cannot recover consequential damages from a seller (except a merchant seller) who has *bona fide* sold a thing suffering from a latent defect unless the contract embodies an express warranty against defects (see *Cugno v Nel* 1932 TPD 289; Wille & Millin's "*Mercantile Law of South Africa*" (18 ed) at 243 and cases there cited). It is presumably for this reason that the express warranty is embodied in the first sentence of clause 1 of the agreement. The legal consequence of the warranty is that the defendants would be liable for consequential damages (in addition to Aedilitian relief) in the event of the plaintiffs proving that the defendants at the date of acceptance of the offer knew of the existence of the alleged latent defects.

[13] Clause 1 also provides that the property is sold *voetstoots*. This provision serves to exclude the seller from liability in respect of all defects of which he was genuinely ignorant up to and at the time of the sale (see *Knight v Trollip* 1948 (3) SA 1009 (D) at 1013). A seller will be deprived of the protection afforded by a *voetstoots* clause where the purchaser proves that the seller (1) was aware of a defect in the thing sold at the time of the making of the contract; and (2) *dolo malo*, that is deliberately concealed its existence from the purchaser with the purpose of defrauding him (see *Van der Merwe v Meades* 1991 (2) SA 1 (AD) at 8E-F).

[14] In considering the question of fraud it is important to note that ignorance due to negligence or ineptitude, mere non-disclosure is insufficient to found an action for fraud and nullify the protection of a *voetstoots* clause. It would have to be shown: that the defendants knew of the defects at the time of the making of the contract and that the purchasers had no knowledge thereof; and that the plaintiffs designedly concealed their existence from the purchaser or craftily refrained from informing the purchaser of their existence (see the *Meades*' case *supra* and the reference therein to *Glaston House (Pty) Limited v Inag (Pty) Limited* 1977 (2) SA 846 (A) at 867G-868A, and *Knight* at 1013; see, also, *Forsdick v Youngelson* 1949 (2) P.H. A57N, and *Waller v Pienaar* 2004 (6) SA 303 (C) at paras 8 & 9).

[15] To succeed on the basis of the warranty the plaintiffs must show that as at the date of acceptance of the offer the defendants were aware of the

existence of the alleged latent defects and to overcome the provisions of the *voetstoots* clause the plaintiffs would be required to establish that the defendants were aware of the defects and that they designedly or craftily concealed their existence from the plaintiffs for the purpose of defrauding them.

WHETHER THE ALLEGED DEFECTS ARE LATENT IN NATURE

[16] It is common cause that the thatch roof was damaged and developed certain leaks during a severe storm that occurred in 2006. In consequence, the defendants lodged a claim with their insurers, ABSA. They in turn appointed Mr Bornmann, an independent loss adjustor, to assess the validity of the claim and in particular to determine whether the damage that had occurred was caused by an insured vent or peril covered by the policy.

[17] Bornmann inspected the property and found that there were structural problems with the roof but that these were not the result of an insured peril. He recommended in a written report to ABSA (Exhibit A p 4) that structural repairs to the roof be effected and that ABSA make an *ex gratia* payment to the defendants in respect of the cost of the remedial work required.

[18] Although not an expert in the construction and structure of thatch roofs, Bornmann made a number of pertinent observations during his inspection of the property. He observed that the top horizontal beam was cracked and that the split pole, trusses or struts were spaced too far apart, causing the thatch to sag in places. There was evidence of movement of the roof; the trusses had moved, causing cracks in the walls where they were affixed and the flashing had pulled away from the walls, causing water to enter and to run down the interior walls. In his view, the trusses had to be reinforced and supported by horizontal beams or poles.

[19] Mr Braaf, a professional thatcher, was contracted to attend to the remedial work. Braaf, who did not give evidence as an expert, also testified that the horizontal beam was cracked and that the trusses or struts were too far apart, causing the roof to sag. He suggested that the they be supported and strengthened as indicated on a sketch (Exhibit A, p 9) the work that was indicated in order to reinforce the roof. He also thought that the pitch of the roof was too low. He provided the first defendant with a quotation, which the first defendant accepted telephonically. There is a dispute as to whether during this telephone conversation Mr Braaf told the first defendant that there were fundamental structural problems with the roof. This dispute will be dealt with later in the judgment. Braaf performed the certain remedial work by replacing the tie beams with thicker poles and bolts, and propped up the

thatch to tighten the ropes which kept them in place. He also installed king posts to support the trusses.

[20] The only expert called on behalf of the plaintiffs was Mr Abraham Visagie, a structural engineer and member of a company specialising in thatch roofs. Visagie is an expert in the construction and design of thatch and Cape reed roofs. He inspected the roof on 8 September 2010, some four years after work had been performed on the roof by Braaf. His findings were, essentially, that the roof was mostly constructed at the incorrect pitch. The recommended pitch is 45º; he found that 75% of the roof was 35º and the remaining portions of the roof 26.56º. He opined that a pitch below 30º cannot be regarded as functional as the roof would leak water, which would have gone into the thatch or reeds. Visagie observed severe deflection in the ridge line from outside. He explained that deflection is when a structure element is going down or is deflected out of line from the intended design alignment or construction. The ridge beam in the kitchen and lounge had failed. In his view the remedial work that had been performed was not sufficient to make the structure safe in order to ensure that it functions optimally and in accordance with engineering guidelines. The roof, in his view, was incorrectly engineered and the whole roof needed to be replaced. Re-thatching would not suffice as the incorrect pitch would cause the roof to retain water and decay, and eventually leak. The defendants failed to adduce

any countervailing expert evidence and the evidence of Visagie is largely unchallenged.

[21] Having regard to the evidence of Visagie, supported as it is by the observations of Bornmann and Braaf, there can be no doubt that the design of the roof structure is inadequate. The evidence of these witnesses overwhelmingly establishes that the pitch of the roof is incorrect and the thatch roof in its present condition cannot be regarded as functional. Leaks are bound to occur; objectively viewed, the remedial work performed is not sufficient to make the structure safe, and would not pass engineering guidelines. These are clearly abnormal qualities or attributes which destroy or substantially impair the utility or effectiveness of the property for the purpose for which it had been sold and is commonly used. These defects are clearly latent in that they would not have been visible or discoverable upon inspection by the ordinary purchaser (see *Holmdene Brickworks (Pty) Limited v Roberts Construction Co Limited* 1977 (3) SA 670 (AD) at 683H *in fin* to 684C, and cases there cited).

[22] The plaintiffs, as laymen, would have had no reason to suspect that there was a problem with the thatch roof, no matter how reasonably observant or alert they had been. The plaintiffs would have had to rely either upon frank disclosure by the defendants as to the existence of the problem, if the

defendants were aware of the full extent thereof, or to have called in an expert to inspect the roof before purchasing the property. I accordingly hold that the defects that existed at the time of the conclusion of the sale agreement were latent in nature.

DEFENDANTS' KNOWLEDGE OF THE DEFECTS

[23] The vital question (insofar as the main claim is concerned) is whether the defendants were aware of the latent defects when the agreement of sale was entered into. If they were, the defendants would have breached the warranty provided for in clause 1 of the agreement. As already indicated, to overcome the *voetstoots* clause the plaintiffs would be required to show not merely that there was non-disclosure of the defects, but also that the defendants designedly or craftily concealed their existence from the plaintiffs for the purpose of defrauding them.

[24] The following is, in broad terms, a summary of the evidence given in respect of this core question.

[25] The plaintiffs were introduced to the property by the first defendant's agent, Ms Yvonne Spreeth, in March 2007. They initially visited and inspected the property in March 2007 and the first defendant again attended the premises, on his own, at the end of April 2007. The plaintiffs submitted a written offer to purchase on 4 May 2007, which was accepted by the

defendants on that date. The sale was subject to the successful sale by the plaintiffs of their house in Johannesburg. This condition was subsequently waived in terms of the addendum executed on 25 July 2007. The addendum includes the following provision concerning the guarantee: "Seller to transfer guarantee on thatch roof to purchaser from the contractor". The relevance of this clause will be dealt with below when evaluating the alternative claim.

[26] The first plaintiff's evidence is that when he initially viewed the house he noticed that there was some plaster that was cracked above the door, and that the painting over it was slightly discoloured. Ms Spreeth explained to him that some work had been performed on the roof and that this had caused the plaster to come off. At the end of April 2007, when he again viewed the property, he stumbled upon sign-boards belonging to certain estate agents. He called one of the agents, who turned out to be the second defendant; she referred him to the first defendant.

[27] The first plaintiff contacted the first defendant who told him that the contractor had given them a guarantee for the remedial work that had been performed, which guarantee would be given to the plaintiffs when the property was sold. Nothing was said concerning the transfer of the guarantee in the agreement entered into on 4 May 2007, however. A clause to this effect was included in the addendum of 25 July 2007. The first plaintiff also did not have

sight of the guarantee when the offer was submitted on 4 May 2007 and nor did he request to see it.

[28] The property was registered into the names of the plaintiffs on 7 November 2007, upon which day the plaintiffs took occupation.

[29] All appeared to be well until approximately November/December 2007, when it rained and the thatch roof began to leak. It is then that the plaintiffs began to press Spreeth in order to procure transfer from the defendants of the guarantee that had been promised. When the guarantee were not forthcoming, the plaintiffs lodged a complaint against Pam Golding Estates, for whom Spreeth worked, as the plaintiffs felt that it was their responsibility to obtain the guarantee from the defendants. Eventually, in January 2008, Spreeth delivered a letter to the plaintiffs issued by Braaf dated 2 November 2006, in which a purported guarantee dated 27 July 2007 is recorded in manuscript. The guarantee reads:

> "Ses maande waarborg vanaf tydperk wat gewerk was aan riefdak. Dit geld nie vir wind en reënskaade"

[30] The plaintiffs did not consider this to constitute a proper written guarantee as it had expired at about the end of May 2007 and did not cover wind and rain damage. The first plaintiff testified that had he known that there

was no written guarantee he would have caused the roof to be inspected and if the defects had then been discovered he would have reduced his offer to purchase the property by the cost of the repairs.

[31] Ms Yvonne Spreeth's evidence is that at the time that Pam Golding Estates were mandated to sell the property, she was told that a guarantee for repair-work to the roof was in the possession of the defendants and she presumed that this was a written guarantee. After signature of the addendum she received Braaf's letter purporting to contain the guarantee and forwarded it to the first plaintiff. Spreeth also testified that the defendants had told her of the work that had been performed. In a letter to the Estate Agents Board (Exhibit A p 35), Spreeth stated that at a subsequent viewing of the property she informed the first plaintiff that repair-work had been carried out on the roof but did not specify what work had been done as she had not been informed of the details of the remedial work that had been performed.

[32] Mr Braaf's evidence is the first defendant called him on the telephone to accept the quotation, and during this conversation he told him that there were structural problems with the roof, namely that the pitch was too low and that the trusses were too far apart. Braaf claims that he also told the first defendant that the repairs would be of a temporary nature only and that the first defendant said this was acceptable as he intended to sell the property in due course. The first defendant strenuously denies that Braaf informed him

that the thatch roof was fundamentally defective and that the repairs would be of a temporary nature only and disputes Braaf's assertions in this regard.

[33] Bornmann, the loss adjustor's testimony is that he informed the first defendant that the trusses and cracked beam had to be reinforced to prevent further movement and cracking. After the work had been performed by Braaf, he reported to the first defendant that the repairs that had been carried out were an improvement but were not done in a way he would have wanted them to be done and were not optimal. This is not disputed by first defendant. It is common cause that Bornmann's report to ABSA (Exhibit A p 4) was not made available to the first defendant.

[34] The following facts emerge from testimony of the first defendant. He denies in the strongest terms that at the time of the conclusion of the agreement, either he or his wife, the second defendant, had knowledge of the defects referred to in paragraphs 9.1 to 9.5 of the particulars of claim. They live and carry on business in Kempton Park. The property was purchased for investment purposes in 2004. The defendants have never lived in the property and always hired same out to tenants. The first defendant's brother, Roelof Van der Spuy, who lived nearby in Villiersdorp looked after the property on the defendants' behalf from time to time.

[35] The first defendant testified that in about September 2006, whilst visiting the property he observed that rain damage had occurred in the lounge and he lodged a claim with the plaintiffs' insurers, ABSA. He thereafter met Bornmann at the property, who explained to him that there were structural problems caused by the main beam that had cracked, and that the struts or trusses which were spaced too far apart, causing movement in the roof. Bornmann expressed the view that horizontal reinforcement was necessary. The first plaintiff decided to go ahead with the repair-work suggested by Bornmann as he was made to understand that if he did not, the defendants would not be able to obtain further insurance from ABSA.

[36] First defendant instructed his brother, Roelof, to obtain a quotation from a contractor and to supervise the necessary repairs. He (the first defendant) returned to Johannesburg. Roelof procured the trusses of Mr Braaf and thereafter sent a quotation give to him by Braaf. The first defendant was satisfied with the quotation and authorised Roelof to accept same and to instruct Braaf to proceed with the work. At that stage the first defendant had no contact with Braaf. After the repairs had been effected, he received a further quotation from Braaf and he decided to contact him as there were differences between this quotation and the one that had originally been submitted. He spoke to Braaf telephonically. Braaf confirmed that the differences related to certain additional paintwork that had to be effected. First defendant accepted Braaf's explanation, as already indicated. The first

defendant denies that during this telephonic conversation he was told by Braaf that the repairs would be of a temporary nature and that there were fundamental structural problems with the roof relating to the pitch of the roof. As far as he was concerned, the repair-work effected by Braaf had effectively taken care of the water damage that had occurred.

[37] The first defendant concedes that during his conversation with Braaf they discussed the question of a guarantee in respect of the repairs that had been effected. First defendant contends that he requested a guarantee for a year but Braaf insisted that the guarantee would only be good until "*after the first rains*". First defendant understood that the guarantee given by Braaf would be good until after the first rains in about June or July of 2007.

[38] In cross-examination the first defendant admitted that the question of him furnishing a guarantee to the plaintiffs was discussed with the first plaintiff prior to entering into the sale agreement on 4 May 2007 and that during the negotiations he indicated to the first plaintiff that he was prepared to make over his rights under the guarantee to the plaintiffs. He did this because at that stage the guarantee had not yet expired. He admits that when the addendum was signed on 25 July 2007, the guarantee had expired as the first rains had taken place. I will deal later with the relevance of this admission when evaluating the alternative claim.

[39] Roelof Van der Spuy, the brother of the first defendant, corroborated the first defendant's evidence in regard to the obtaining of a quotation from Mr Braaf, and first defendant's limited involvement with him. In particular, Roelof Van der Spuy confirmed that it is he who obtained a quotation from Mr Braaf and escorted Braaf around the property when he attended at the premises for the first time. He, on behalf of the first defendant, accepted the quotation and instructed Braaf to proceed with the work. He inspected Braaf's work from time to time.

[40] The defendants' knowledge of the condition of the thatch roof would at best be based on their personal observations when visiting the property and what had been told to them by Bornmann, Braaf and the first defendant's brother, Roelof. The first defendant was undoubtedly aware of the presence of rain damage that had occurred in the lounge and he would have been aware that the main beam was cracked and that the trusses needed reinforcement to prevent further movement of the roof and cracking of plaster. This was pointed out to him by Bornmann, the loss adjustor, when Bornmann visited the property after the lodgement of the claim.

[41] Bornmann was clearly unaware that the fundamental problem with the roof was that it was mostly constructed at the incorrect pitch. Had he been so

aware he would as a probability have mentioned this in his report and informed the first defendant accordingly. Bornmann had a clear recollection of his visit to the property and his discussions with the first defendant and was a satisfactory and reliable witness. At no stage did Bornmann suggest that he found any of the latent defects alleged in paragraphs 9.1 to 9.5 of the particulars of claim. The first defendant relied essentially upon what Bornmann told him and elected to proceed with the recommended remedial work based on this recommendation.

[42] Only a structural engineer or expert thatcher who measured the pitch of the roof would have been in a position to say with certainty that the low pitch of the roof was the fundamental cause of the problems. Significantly, only the structural engineer, Visagie, who actually measured the pitch in 2010, well after the agreement of sale was entered into, states with certainty that the roof is mostly constructed at the incorrect pitch. According to Visagie, the recommended pitch is 45º; he found that 75% of the roof was 35º and the remaining portions of the roof 26.56º. He testified that a pitch below 30º cannot be regarded as functional as the roof would leak water.

[43] Mr Braaf was adamant that he discussed the pitch of the roof with the first defendant during their conversation when the quotation was accepted that this is disputed by the first defendant.

[44] Mr Braaf did not impress the Court as a reliable or satisfactory witness. He did not have an independent memory of his visit to the premises and it is clear that he was uncertain as to whether his dealings were with the first defendant or his brother, Roelof. He claimed that the first defendant called him to accept the quotation, whilst the uncontested evidence of Roelof as corroborated by the first defendant is that it was he, Roelof, who had first contacted Braaf and later accepted the quotation. Braaf conceded in cross-examination that he only spoke to the first defendant for the first time telephonically after the work had been completed.

[45] Mr Braaf claims that he contacted Mr Bornmann to inspect the work after he had finished, but this is denied by Bornmann. The probabilities are that if Mr Braaf had spoken to Bornmann he would also have told him about the problems with the pitch of the roof. Significantly, Bornmann makes no mention that there were problems with the pitch either in his evidence or in his report to ABSA.

[46] Mr Braaf gave contradictory evidence concerning the pitch of the roof and the repairs that would be necessary in order to rectify same. He contended, on the one hand, that he had told the first defendant that the pitch of the roof was incorrect and that no amount of repair other than to replace

the roof would offer a long-term solution. Yet, in apparent contradiction of this, Mr Braaf testified that he did not deem it necessary to replace the whole roof. He was also adamant that he would not have quoted for unnecessary repairs if the entire roof had to be replaced.

[47] Mr Bornmann impressed the Court as a reliable witness. He had a clear and independent recollection of his visit to the property and all that had occurred.

[48] On a proper conspectus of the material evidence and the probabilities that emerge therefrom, I find that when the agreement of sale was entered into the defendants did not appreciate that the design structure of the roof was fundamentally flawed or inadequate. They would not have known that the roof was mostly constructed at the incorrect pitch, as testified to by the structural engineer, Mr Abraham Visagie. They were aware that the roof had leaked during the rains that had occurred in about September 2006, and that remedial work had been performed in order to reinforce the cracked beam and the trusses. The leaks did not re-occur during and after the first rains in June or July 2007, and the defendants would have had no reason to question the quality of the remedial work that had been performed by Mr Braaf.

[49] Prior to entering into the agreement on 4 May 2007, the defendants made disclosure to the plaintiffs of the fact that the thatch roof had leaked during rains in 2006, and that remedial work had been performed. They also disclosed this to their agent, Spreeth, who imparted this information to the plaintiffs. The plaintiffs could have consulted an expert with a view to establishing whether the remedial work had been properly effected and whether there were any further problems with the roof before entering into the agreement of sale but they chose not to do so. The present case is not an instance in which there was an involuntary reliance by the plaintiffs upon the defendants for information concerning the defects.

[50] The plaintiffs have failed to establish on a balance of probabilities that when the sale was entered into the defendants had knowledge of the latent defects and that they designedly, craftily or fraudulently concealed their existence from the plaintiffs. In the circumstances the plaintiffs cannot rely on the warranty incorporated in the first sentence of clause 1 of the sale agreement, and nor can they overcome the effect of the *voetstoots* clause therein contained.

[51] For these reasons the plaintiffs' main claim falls to be dismissed.

THE ALTERNATIVE CLAIMS

[52] The plaintiffs' case is that prior to signature on 4 May 2007, the defendants and their agent represented to them that a valid written guarantee regarding the soundness of the thatch roof was in place and that the defects had been rectified. These representations were said to have been fraudulently or negligently made with the intention of inducing the plaintiffs to enter into the agreement. In consequence the plaintiffs claim damages in the sum of R449 499. In the further alternative, such damages are claimed on the basis of the *actio ex empto*. The amount claimed as damages constitutes the replacement cost of the entire roof structure.

[53] There is no justification in the evidence for the amount claimed. Visagie testified that the cost to replace the roof as at 6 February 2008 was R344 662 plus Value Added Tax. Later, in his evidence, Visagie determined the base figure to be R309 698 plus 14% VAT of R43 357.72, leaving a total of R353 055.72. In argument, yet a further amount was put forward as appropriate.

[54] In order to succeed the plaintiffs must establish a fraudulent or negligent misrepresentation on the part of the defendants in relation to the guarantee; that such misrepresentation induced the plaintiffs to contract on the terms set out in the agreement of sale and the addendum, and that in

consequence the plaintiffs have suffered patrimonial loss equivalent to the replacement cost of the entire roof structure.

[55] The following further factual and/or legal considerations arise in regard to the alternative claims:

(1) Whether the defendants and their agents represented to the plaintiffs that they were in possession of a written guarantee as alleged.

(2) The materiality of the guarantee and, more particularly, whether the plaintiffs would have entered into the agreement on its terms or on different terms had they known there was no guarantee or written guarantee.

(3) Whether damages in respect of the latent defects are claimable at all, given the fact that the property was purchased *voetstoots*.

(4) Whether the loss claimed is a direct consequence of the misrepresentations made in relation to the guarantee.

(5) If damages are claimable, (a) whether the damages claimed arise as a direct consequence of the misrepresentations made; (b) whether the appropriate measure of damages is the replacement cost of the roof as a whole or some other amount. It is trite that a litigant who sues in delict is entitled to the aggregate or losses sustained as a direct consequence of having been induced to enter into the contract, whereas a litigant who sues in contract sues to have his bargain or its equivalent in money (see *Trotman and Another v Edwick* 1951 (1) SA 443 (A) at 449B-C; *Ranger v Wykerd* 1977 (2) SA 976 (A) at 991B-E and 994H-995A, and cases there cited; also see *Davidson v Bonafede* 1981 (2) SA 501 (C)); (c) whether the appropriate measure of damages is the replacement cost of the roof, given the fact that the guarantee only applied to the remedial work that had been performed in remedying the leak.

[56] It was submitted by defendants' counsel that the furnishing of the guarantee was not material to the plaintiffs. I do not agree with this contention. It is common cause that the furnishing of a guarantee was discussed by the parties prior to the conclusion of the agreement of sale on 4 May 2007. The first plaintiff testified that prior to submitting the offer the first defendant told him that repairs had been carried out on the roof and that a

guarantee was in place which would be transferred to the plaintiffs. This is admitted by the first defendant. It is also common cause that when the agreement was signed on 4 May 2007 no provision was made for the transfer of the guarantee but this was rectified later on 25 July 2007, when the parties entered into the written addendum.

[57] It was further argued on behalf of the defendants that first plaintiff had no right to assume that the guarantee was in writing as nobody had told him that it was. This argument is specious. In my view, it would have been reasonable for the plaintiffs to have assumed that the guarantee was in writing. Ms Spreeth, the defendants' own agent, presumed that the guarantee that the defendants were to make over to the plaintiffs was a written guarantee and she imparted this to the first plaintiff. This much is to be implied from her letter to the Estate Agency Board (Exhibit A p 35).

[58] The evidence demonstrates that the defendants were less than candid with the plaintiffs in regard to the existence of the guarantee. The first defendant knew that Mr Braaf had given him an oral guarantee which, to say the least, was tenuous. According to the first defendant he had asked Braaf for a guarantee for a year, but this was refused. Braaf was only prepared to guarantee his workmanship until "*after the first rains*". The first defendant

testified that his understanding was that the guarantee would be good until after the first rains in about June or July 2007.

[59] When entering into the agreement on 4 May 2007, the first defendant did not disclose to the plaintiffs that the guarantee was only limited until the advent of the first rains. Worse still, when the defendants signed the written addendum on 25 July 2007, they knew, but failed to disclose, that the guarantee had lapsed.

[60] It was put to both the first plaintiff and Mr Braaf by defendants' counsel that a verbal guarantee of one year had been agreed upon. This instruction, given by the first defendant to his counsel, was clearly incorrect and the first defendant conceded as much in cross-examination. Later, it was put to Braaf by defendants' counsel that first defendant would testify that he had asked for a guarantee until after the first rain season, for one year, and that Braaf had agreed to this. All of this reflects adversely on the first defendant's credibility and version in respect of the guarantee.

[61] The evidence tendered by the first defendant in regard to the guarantee is also inconsistent with what is stated in paragraph 9 of the defendants' plea. It was there pleaded that before the agreement of sale was entered into the defendants disclosed and handed all documentation to the

plaintiffs in respect of a prior incident, where a leak in the roof occurred during an exceptionally heavy rainstorm in 2006. It is apparent from the evidence that no documentation (which presumably would have included the guarantee) was handed to the plaintiffs.

[62] The first defendant was clearly unsettled when cross-examined in regard to the non-disclosures and contradictory versions put by his counsel and was unable to advance any credible or plausible explanation.

[63] It is obvious that when the addendum was entered into on 25 July 2007 the defendants had no written guarantee in their possession and the oral guarantee that they purported to have had lapsed. On the probabilities the defendants gave the undertaking to deliver, what at that stage was a non-existent guarantee, because they did not wish to sabotage or derail the contract and hoped that in the fullness of time there would be no need on the part of the plaintiffs to rely upon same.

[64] The defendants knew, at the time of the signing of the agreement in May 2007, that the guarantee would lapse on the coming of the first rains, and were aware when the addendum was signed of the fact that the guarantee had lapsed. To have undertaken in these circumstances to provide a guarantee was thoroughly misleading and in my view fraudulent.

[65] For these reasons I am satisfied that a fraudulent misrepresentation was made by the defendants to the plaintiffs in regard to the existence of the guarantee and their ability to transfer same to the plaintiffs.

[66] This finding raises two important questions: (a) Whether the damages claimed arise as a direct consequence of the fraudulent misrepresentation relating to the guarantee; and (b) whether reliance can be placed by the defendants on the *voetstoots* clause which would exclude any liability for latent defects.

[67] As to the question posed in (a) above, the first plaintiff testified that had he known there was no written guarantee he would have had the roof inspected and that should he have discovered the defects he would have reduced his offer by the cost of the repairs. This contention is difficult to accept. The plaintiffs did nothing before signing the agreement to establish whether a written guarantee was in existence or to determine the terms and scope of the guarantee. They must, as a probability, have known that the guarantee related only to the remedial work performed by the contractor. Having been forewarned prior to signing the agreement that there had been previous rain damage requiring remedial work, the plaintiffs could, if they so wished, have approached an expert to inspect the roof to establish whether

the remedial work had been properly executed and whether there were any other defects present. I am not satisfied therefore that the damages claimed, namely the cost of replacement of the roof, arise as a direct consequence of the defendants' fraudulent conduct in relation to the guarantee.

[68] The guarantee, even if provided by the defendants to the plaintiffs, would not have prevented the plaintiffs from suffering loss as a result of the presence of the latent defects. It is common cause or not in dispute that the guarantee given by the contractor, Mr Braaf, only related to the remedial work performed and did not operate as a guarantee or indemnification in respect of all latent defects.

[69] I find therefore that the damages claimed, being the cost of replacing the thatch roof as testified to by the expert, Visagie, do not arise as a direct consequence of the defendants' fraudulent conduct in relation to the guarantee.

[70] As to the question posed in (b), it is a trite legal principle that absent proof of designed or active concealment of the defects, the *voetstoots* clause would exclude liability for any latent defects such as those that exist in the present case (see *Van der Merwe v Meads*, *supra*, and cases there cited, especially *Knight v Trollip*, *Forsdick v Young* and *Glastenhouse (Pty) Limited*

v Inag). I have already found that the defendants as a probability were not aware that the thatch roof suffered from a fundamental structural defect relating to the pitch of the roof and therefore could not have known or foreseen that an inspection of the roof by an expert might lead to the disclosure of the latent defects. The defendants could not have made the misrepresentations relating to the guarantee with the intention of designedly or craftily concealing or preventing the plaintiffs from discovering the existence of the latent defects. The defendants are thus entitled to rely upon the *voetstoots* clause in order to resist the plaintiffs' claims.

[71] Accordingly, the alternative claim for delictual damages cannot succeed.

[72] So far as reliance is placed on the *actio ex empto*, the following considerations are relevant. A litigant who sues in contract, sues to have his bargain or its equivalent in money. The promised guarantee only covered the remedial work performed by Mr Braaf. It did not purport to indemnify the holder in respect of all latent defects in the thatch roof. The plaintiffs would, at best, upon proof that the remedial work was not properly performed, be entitled to be placed in the position that they would have occupied had the guarantee been furnished (see *Trotman v Edwick*, *supra*; *Ranger v Wykerd*, *supra*, and cases there cited). The plaintiffs cannot be placed in a better

position they would have occupied under the contract simply because the guarantee was not furnished by the defendants. Damages *ex empto* have in any event not been established.

[73] In the result, the alternative claims fall to be dismissed.

[74] As far as costs are concerned, the following considerations are relevant: The defendants' reprehensible conduct in relation to the guarantee is, in my view, sufficient ground to deprive them of a portion of their costs. I also bear in mind that some 4½ hours of Court time was lost as a result of indulgences sought by the plaintiffs. Some 90 minutes was lost on 12 October 2010, when the plaintiffs' witnesses were not available timeously in order for the Court to start at 10h00, and on 13 October 2010, Mr Bornmann was unavailable to testify and the matter had to stand over until the following day. These costs should properly be paid by the plaintiffs. Having regard to these considerations and the facts of the case as a whole, I am of the view that it is just and equitable that each party bears its own costs.

THE ORDER

[75] The following order is granted.

(1) The plaintiffs' claims are dismissed.

(2) Each party is to pay its own costs.

DATED at JOHANNESBURG on this the 23rd day of SEPTEMBER 2011

_____

P BORUCHOWITZ
JUDGE OF THE SOUTH GAUTENG
HIGH COURT

ATTORNEY FOR PLAINTIFFS	MR M WAGENER
INSTRUCTED BY	BOWMAN GILFILLAN INC
COUNSEL FOR RESPONDENTS	ADVOCATE B M HEYSTEK
INSTRUCTED BY	MARITZ BOSHOFF & DU PREEZ INC