

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2014/35076

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

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DATE

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SIGNATURE

In the matter between:

**CHARLOTTE JACOBS**

Excipient

And

**KEITH SMALL**

First Respondent

**CHARMAINE SMALL**

Second Respondent

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**J U D G M E N T**

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**MAKUME, J:**

[1] During or about the 24<sup>th</sup> January 2014 the Respondents purchased a residential dwelling from the Excipient in terms of a written sale agreement.

The Respondents paid the agreed purchase price of R3 350 000,00 for the property. The property has been transferred into their names and they have taken occupation.

[2] During September 2014 the Respondents as First and Second Plaintiffs issued summons against the Excipient claiming that at the time of the sale agreement the property suffered from latent defects which defects the Excipient was aware of and failed to disclose same.

[3] The Respondents continue in paragraphs 15 and 16 of the particulars of claim and allege that had they known of the defects at the time of the sale agreement they would not have purchased the property alternatively they would have paid a lesser purchase price for the property.

[4] The Respondents' claim is pleaded as follows in paragraph 16:

*"16. Accordingly the Plaintiffs would have reduced the purchase price in the amount of R163 243,02 so as to bring the premises into a state of repair fit for occupation and the purposes for which it was purchased."*

[5] On receipt of the summons the Excipient filed and served on the Respondents a notice in terms of Rule 23(1) of the Uniform Rules of Court alleging that the Respondents' particulars of claim lack the necessary averments to sustain a cause of action.

[6] The Excipient relies on the provisions of clause 9 of the sale agreement which provides that in the event of a breach being committed by the purchaser the seller is obliged to give the purchaser 7 days written notice to remedy the breach.

[7] The Excipient maintains that the Respondents failed to address such notice to him calling on him to rectify the breach further that no such written notice to remedy the breach is pleaded in the summons.

[8] It is on this basis that the Excipient prays that the Respondents' summons and particulars of claim is excipiable and falls to be struck off.

[9] The exception is opposed. In the heads of argument and the practice note the Respondents say that their case is not based on a breach of contract but that it is based on the *actio quanti minoris*.

[10] Clauses 9.1 and 9.2 of the sale agreement deals with the procedure when there is a breach of contract committed by either the seller in this case the Excipient and the Purchaser in this case the Respondents. However, clauses 9.1.1, 9.1.2 and 9.1.3 which deal with consequences of a failure to remedy a breach complained of only sets out remedies that are available to the seller in this case the Excipient who can choose to either cancel the agreement and claim damages or keep the contract in place and claim the payment of the full purchase price. There is no remedy available to the purchaser prescribed in clause 9.

[11] The Respondents in the particulars of claim are not relying on any breach of the contract that requires a notice to be sent out to the seller. Their claim is based on a concept known as *actio quanti minoris* or what is also known as price reduction. It is not an action aimed at cancellation of the agreement and refund of the full purchase price it is a stand alone action outside the breach clause of the agreement and it is based on latent defects.

[12] Holmes JA in the matter of *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A) at page 416H-417C writes as follows:

*“If there is a latent defect at the time of the sale ipso facto the aedilician remedy is available (unless excluded by agreement). The seller’s obligation and the buyer’s right arise by operation of law and not by reference to the intention of the parties. It is unnecessary for the buyer to try to fit his resultant right into the concept of a so-called implied warranty against such defects. Nor does the buyer have to aver and prove a breach of a term of the contract.”*

[13] The Respondents (Plaintiffs) have in their particulars of claim pleaded all the essential allegations to sustain a cause of action based on the aedilician action of *actio quanti minoris*.

[14] The Respondents’ action is not based on the contract and there was accordingly no need for the Respondents to send any notice to the Excipient to remedy the latent defect. Accordingly the exception is bad in law and falls to be dismissed.

[15] In the result I make the following order:

The exception is dismissed with costs.

DATED at JOHANNESBURG on this the 21 OCTOBER 2015.

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**M A MAKUME**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

DATE OF HEARING	6 <sup>th</sup> October 2015
DATE OF JUDGMENT	21 <sup>st</sup> October 2015
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