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REAL ESTATE ALERT

IN THIS **ISSUE**

VOETSTOOTS: WHAT MEETS THE EYE ... OR NOT

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The Purchasers instituted action for cancellation of the sale agreement stating that they would not have bought the property if they had known about the defects, alternatively they claimed a reduction in the purchase price or damages.

The judgment in *Ellis and Another v Cilliers NO and Others* 2016 (1) SA 293 (WCC) serves as a warning to sellers, however, that there are instances where the *voetstoots* clause is of no protection.

The *Ellis* judgment

Mr and Mrs Ellis (Purchasers) purchased a wooden house from Mrs Cilliers (Seller), the back of which was built into a slope and the front of which was on stilts. The sale agreement contained a *voetstoots* clause which stated that the Seller would not be responsible for any latent or patent defects or answerable for any warranties either express or implied and that the Purchasers confirmed that they had satisfied themselves as to the condition of the property personally or by a duly authorised person on their behalf.

After registration of transfer the Purchasers started renovating the house in order to make the lounge, kitchen and dining area "open plan". Upon removing the kitchen cupboards they discovered that two sections of the kitchen floor had been cut out and later replaced to give access to the area below and that the floor had subsided at the outer edges so that the middle part was higher than the sides. Further expert investigations revealed that the house had a number of other defects, namely:

- it was no longer level as a result of subsidence on the northern side due to severe decay in the foundation supporting it;
- a cement screed had been poured over the wooden floors which were then carpeted and tiled over and a false ceiling had been constructed under and suspended from the original ceiling, all to create the illusion that the house was level (Levelling Treatment);
- the lounge floor had been raised by the use of wooden wedges so as to conceal the subsidence; and
- a Nutec cladding had been applied to the outside of the house, also to conceal the subsidence.

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The court had to consider whether the Seller was indeed protected by the voetstoots clause or whether the purchasers had proved, as set out by Cachalia JA in Odendaal v Ferraris 2009 (4)SA 313 (SCA), that the seller had known of the latent defects.

The Seller, while acknowledging that the condition of the foundation constituted a latent defect, claimed that she had been unaware of its condition and was therefore protected by the *voetstoots* clause. The seller did admit that the cement screed had been applied to level the floors but denied that one or more of the alleged defects in the Levelling Treatment constituted defects. The Seller alleged that the installation of the false ceiling had been done for aesthetic purposes only and that the levelling of the ceiling did not constitute a defect. The Seller further contended that the wooden wedges used to level the lounge floor were an improvement and also done for aesthetic purposes and therefore did not constitute a defect. With regard to the Nutec cladding, the Seller alleged that this was done to save on painting which would otherwise have had to be done every three years.

The court had to consider whether the Seller was indeed protected by the *voetstoots* clause or whether the purchasers had proved, as set out by Cachalia JA in *Odendaal v Ferraris* 2009 (4)SA 313 (SCA), that the seller had known of the latent defects and had deliberately failed to disclose them with the intention to defraud or had known about the defects and had failed to disclose them as she had not considered their significance, which could also amount to fraud.

Latent defects

The courts, when considering what constitutes a latent defect, most often refer to *Holmdene Brickworks (Pty) Ltd v Roberts Construction Ltd* 1977 (3) SA 670 (A) where the Supreme Court of Appeal broadly defined a latent defect as "an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita* for the purpose for which it has been sold or for which it is commonly used. Such defect is latent when it is one which is not visible or discoverable upon an inspection of the *res vendita*". In Odendaal the Supreme Court of Appeal extended this definition to include "in a broad sense, any material imperfection preventing or hindering the ordinary or common use of the res vendita", thereby including not only physical defects but also non-physical defects such as building plans. The court did, however, stress that each case must be decided on its own merits.

Levelling Treatment – a defect

What hinders the ordinary common use of the *res vendita*? The court in Ellis expressed the view that an imperfection is not a static concept but is influenced by changes in style, custom and other factors influencing modern living, the purpose for which the property was purchased and also what a reasonable man would expect of the type or nature of such property.

The court further expressed the view that in present times it is not uncommon for young couples to purchase property with the intention of renovating it to suit their needs and that a wooden home is easily renovated at relatively little cost compared to that of a brick home.

The court held that a reasonable man purchasing a wooden house would expect to be able to renovate it and would not have expected to find false ceilings and cement screed covering the wooden floors.

The court agreed with the Purchasers' statement that if there had been no defect the Seller would have had nothing to level. The court was of the opinion that the unlevel wooden floors had been a concern for the Seller but because she did not testify the court was unable to ascertain whether this was for aesthetic reasons or not.

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The court further found that the Seller had not considered the significance of her non-disclosure and that by her actions had intended to defeat the provisions of the voetstoots clause.

The court accordingly found that the unlevel floors were a latent defect which only the Seller knew about and that the defect "hindered the ordinary or common use of the *res vendita*".

Disclosure

The court was of the view that the dictum by Cachalia AJ in *Odendaal* was applicable: "where 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."

The court, in concluding that there is an obligation on the seller to disclose any unusual or abnormal qualities of the *res vendita*, relied on *Dibley v Furter* 1951 (4) SA 71 (C) in which Van Zyl J referred to Pothiers "Treatise on Contract Sale" which states that in a contract of sale the seller is obliged in good faith to declare all that he knows about the thing sold to the purchaser, who has interest in knowing it, and that the failure to do so is against good faith. Van Zyl J concludes that "it seems therefore to me that the defect, to give rise to the obligation to disclose, need not be a redhibitory one – ie one giving rise to *aedilition* relief – provided that its non-disclosure would have the effect of placing the parties on unequal terms, and that when this latter takes place it is only in cases where the buyer has been really overreached that relief must be granted".

The court in *Ellis* found that the unlevel floors were such an unusual feature that the Seller, even if she didn't think them unusual, should have told the Purchasers about them - the court could only conclude that she did not do so because she had been afraid that if she had, the Purchasers would not have bought the house.

The court further found that the Seller had not considered the significance of her non-disclosure and that by her actions had intended to defeat the provisions of the *voetstoots* clause.

Conclusion

Disclose, disclose, disclose.

The fear of not selling a house or achieving the desired asking price should not deter a seller from making a full disclosure of all defects, patent or latent, whether the seller considers them significant or not, as the failure to do so could end up costing more in the long run.

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