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SUPREME COURT OF APPEAL RULES THAT THE VOESTOOTS CLAUSE PROTECTS SELLER FROM ABSENCE OF APPROVED PLANS

ODENDAAL V FERRARIS

FACTS

1. Ferraris purchased a property from Talita Odendaal. After he moved in on 30 June 2006 and before the transfer was registered Ferraris discovered various defects in the property. Amongst others, the outbuilding ceilings had considerable water damage and had partially collapsed and there was a sewer manhole in the laundry.
2. Ferraris attended to the municipality and found that;
 - the sellers' predecessor in title had obtained approval for the outbuilding in March 2000, but only as a storeroom and subject to the condition that the sewer was rerouted so as to comply with municipal town planning regulations, which was never done
 - and that on three different occasions the municipality had rejected building plans submitted for the carport, which did not comply with the National Building Regulations and building Standards Act 103 of 1977 as it transgressed the 1.5 meter building line applicable to property zoned "residential 1"
3. Due to Ferraris referring the above issues to FNB, FNB instructed their attorneys not to proceed with the bond registration.
4. Odendaal's attorneys wrote to Ferraris and advised him to, within seven days of their letter, elect to either cancel the agreement or to withdraw his instruction to FNB to not proceed with the bond registration as his instruction to FNB constituted a breach of the agreement. They furthermore stated that should they not receive his election within the seven days, that Odendaal will accept Ferraris' instruction to FNB as a repudiation of the agreement and that Odendaal will act in terms of her rights contained in the agreement of sale.
5. Odendaal instructed her attorneys after the expiration of the seven day period to cancel the agreement. Odendaal's attorney duly wrote to Ferraris after the expiration of the seven day period and confirmed that his refusal to allow the matter to proceed constituted a repudiation which Odendaal accepted and therefore cancelled the agreement of sale with immediate effect and demanded that he vacates the property.
6. Ferraris refused to vacate. His attorney advised that Ferraris had not yet decided whether he would proceed with the sale at a reduced price or rescind the sale and that he was entitled to a reasonable period to obtain quotes to remedy the defects so that he could arrive at an informed decision.
7. On 18 August 2006 Odendaal commenced with eviction proceedings and five weeks later Ferraris purportedly exercised his election to abide by the contract, though reserving the right to claim damages or alternatively a price reduction.

8. Odendaal rejected his election and the matter proceeded to hearing in the High Court

HIGH COURT

9. The High Court found in favour of Ferraris and said that Ferraris was entitled to invoke the aedilician remedies and rejected Odendaal's contention that by instructing the bank not to proceed Ferraris repudiated the contract. Therefore the Court concluded that Odendaal unlawfully cancelled the agreement and was therefore not entitled to evict Ferraris.

SUPREME COURT OF APPEAL OF SA

10. Odendaal took the matter on appeal.
11. Counsel for Ferraris referred to the decision in *van Nieuwkerk v McCrae* wherein it was held that the a buyer of residential property is entitled to assume that all buildings on the property was erected in compliance with all statutory requirements and therefore it was implied as a term in any agreement of sale of property.
12. The SCA judge found that that the absence of statutory approval in this case constituted a latent defect, which interfered with the ordinary use of the property. The voetstoets clause covers the absence of statutory authorisations as the whole purpose behind the voetstoets clause is to exempt the seller from liability for defects in the property he was unaware of. Only where a purchaser can prove that the seller **knew** of and **failed** to disclose the existence of the defect and also **deliberately concealed** it with the intention to defraud, will the seller not be able to rely on the voetstoets clause.
13. Therefore regarding the damaged ceiling boards in the outbuilding: Because the buyer had opportunity to inspect the property before buying it (but failed to avail himself of this opportunity because the outbuildings were locked at the time of the inspection), and nevertheless bought it with patent defects he has no recourse against the seller.
14. Regarding the absence of approved plans: Although it was clear that Odendaal was aware that the plans for the carport were not approved, there was no evidence from Ferraris to suggest that Odendaal **deliberately concealed** this from him.
15. The Court said in the final instance that they will not lightly infer fraud and will only do so where clearly stated and succinctly supported by the facts. As Ferraris failed to lay the basis for finding fraud he cannot avoid the consequences of the voetstoets clause.
16. It follows that Ferraris' instruction to FNB did constitute a repudiation of the agreement, which entitled Odendaal to cancel the agreement and Ferraris was ordered to vacate the property by no later than 30 November 2008.

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