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**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**CASE NO: 2017/4418**

**REPORTABLE: NO**

**OF INTEREST TO OTHER JUDGES:NO**

**REVISED:NO**

In the matter between:

MOLATELO MALOKA

Plaintiff

and

NICHOLAS FRANCOIS VERMEULEN

1<sup>st</sup> Defendant

HESTA VERMEULEN

2<sup>nd</sup> Defendant

**JUDGMENT**

MOKOSE J

**Introduction**

[1] The plaintiff instituted an action against the defendant for compensation arising out of the alleged defendants' failure to disclose a latent defect in the property purchased by her. The plaintiff contends that the property suffered from significant and severe damp problems not disclosed by the defendants when the property was purchased. The defendants deny that there were damp problems in

the house and if there was damp and it is found to be latent, they were not aware of them. Furthermore, they are protected by the *voetstoots* clause which had been inserted in the offer to purchase.

## **The Pleadings**

[2] According to the pleadings, on 22 July 2014 the plaintiff and defendants concluded a written agreement of sale of the property known as Erf [...] Little Falls, Roodepoort. In terms of the agreement the plaintiff would pay the sum of R2 300 000,00 upon transfer of the property and which would be secured by means of a bank or other guarantee. It was further agreed that the defendants would hand over possession on transfer of the property to the plaintiff.

[3] The agreement of sale also stipulated that the defendants were obliged to furnish the plaintiff with a Property Condition Report (Extended Defects List) within 48 hours of signature of the agreement. It was indeed furnished and in particular the following was stated in the document:

*"6.10.1 that the property suffered from damp, but that the damp was limited to a "Damp wall in the dining room. Not sure if damp? Wall in main bedroom - damp repaired."*

[4] The particulars of claim further claimed that upon taking possession of the property on or about 3 January 2015 the plaintiff discovered that the property suffered from significant and severe damp problems not disclosed by the defendants. These include damp on the floors of the main bedroom and two guest bedrooms, rising and lateral damp on all walls permeating through the property including the main bedroom, the kitchen, dining room, study and spare bedrooms.

[5] It is alleged further in the particulars of claim that that the nature and extent of the damp problems was not visible by the plaintiff upon inspection of the property at the time of the conclusion of the agreement but that they did exist at that time. The plaintiff alleges that the defendants were aware of the latent

defects and in fact deliberately concealed such defects from the plaintiff. The defendants bore a duty to disclose such defects to the plaintiff.

[6] In respect of Claim A, the plaintiff concludes that she is entitled to a reduction in the purchase price in pursuance of the *actio quanti minoris* and that the defendants must pay the sum of R464071,77.

[7] In respect of Claim B of the particulars of claim, the plaintiff contends that the defendants, in breach of their obligations in terms of the agreement, failed to provide the plaintiff with a property that was free from latent defects. As a result of such breach and in order to put the plaintiff in the position it would have been in if the property had been free of the latent defects, the plaintiff was required to engage the services of a contractor to repair, damp proof the property and repaint it. The reasonable cost of the repairs was the sum of R325 238 ,01. The quotation and report were attached to the particulars of claim. In addition, the plaintiff would also incur the sum of R138 833,76 to remove the old tiles damaged by the damp, removed and relay new carpets damaged by the damp, remove and install new cupboards also damaged by the damp in the kitchen, study and main bedroom and remove and install skirting damaged by the damp.

[8] Despite a letter of demand being sent to the defendants, they failed, alternatively refused to remedy the breach and compensate the plaintiff in respect of the damage suffered by her as a result of the breach.

[9] The defendants admitted the conclusion of the agreement in so far as it accords with the particulars of claim. The contents of the Property Condition Report were also admitted. However, the defendants denied that it was an implied term of the agreement that the defendants warranted that the property would be free of defects. The defendants denied that there were damp problems in the house; they were not aware of any latent defects save for those listed in the Property Condition Report and pleaded further that they are protected by the *voetstoots* clause. In short, they denied liability to the plaintiff for any reduction in the purchase price or breach of contract.

## **Plaintiff's evidence**

[10] The plaintiff testified that she saw the property on the Property24 website in early July 2014 whereupon she contacted the agent to arrange a viewing. The plaintiff attended the viewing in the presence of her daughter and the agent, Ms Diane Costa (formerly Wieland). On arrival at the property, they were met by the defendants but were walked around the property by the agent who explained that the property had recently been renovated and painted and in particular that work had been done in the kitchen.

[11] The plaintiff testified further that they had some interaction with the first defendant who pointed out some defects notably, some damp in the main bedroom. The plaintiff testified that she did take notice of some bubbling and peeling of paint in the main bedroom. She asked the first defendant if there were any waterproofing problems and he answered in the negative. On enquiry to the first defendant on the possibility of repairing the damp in the main bedroom, he replied that it would be repaired if the plaintiff was interested in purchasing the house. No other information was volunteered by the defendants in respect of other waterproofing issues other than the work done on the roof. The plaintiff confirmed that she did not notice any other unusual features in the house.

[12] The plaintiff subsequently signed the offer to purchase and obtained the financing from a bank. The defendants indicated to her that certain furniture including the headboard in the main bedroom would remain as they were moving to a smaller house and would not have the space to accommodate it. She thought this as a kind gesture on the part of the defendants.

[13] Before transfer of the property was effected, she visited the house with her father. At that time, she was shown around the house by the first defendant. On that occasion she noticed that the damp she had taken note of in the main bedroom on the previous visit had been repaired however, the texture of the wall where it had been repaired had been smoothed over.

[14] The plaintiff testified that she received the keys to the house on 16 December 2014, transfer of the property having been effected. She moved her belongings into the house on the same day with the assistance of her domestic worker, her brothers and her mother. She did not notice anything untoward. She then locked up the house and went to Polokwane for the holidays the next day.

[15] On her return on 13 January 2015 the plaintiff testified that she experienced an overwhelming sense of damp. At first, she thought it was just a damp smell as the property had been left unattended for almost a month and that the carpets had just been cleaned by the defendants. However, when she started packing her belongings, she noticed that the smell was everywhere and also that there was some discolouration of the carpets. The shelving in the kitchen was 'sunken' and some of her belongings had mould on them.

[16] The plaintiff testified that she had not at any stage looked into the cupboards in the property before she took occupation and when she viewed the property as she felt that this would have been an invasion of the defendants' privacy.

[17] The plaintiff testified that she then made contact with Diane Costa to inform her of the problems in the property and in particular mentioned to her that the problems are damp problems whereupon, Diane came personally to see the property. Diane then contacted the first defendant and also obtained the services of a building constructor to give a quote for the repairs. The contractor moved the headboard and discovered significantly more flaking of paint. He forwarded a quotation to Diane for the repairs. The plaintiff further testified that she never communicated with the defendants directly at all regarding the damp problems and that communication was done through Diane.

[18] The plaintiff further testified that she continued living in the property and during that time noticed more problems associated with damp on the property. She did notify Diane of the continued problems then decided in 2016 to obtain legal advice pertaining to the problem.

[19] The plaintiff testified that she approached a company, Advanced Waterproofing, for a quotation in respect of repair work to be performed on the property. A second quotation was obtained from Hlayi Trading. In cross-examination, the plaintiff responded to a question whether the work in respect of the laying of new carpets was a duplication in the negative. She contended that Advanced Waterproofing had quoted for waterproofing only and that Hlayi Trading had quoted for other work associated with the damp problem.

[20] Peter Allsop, an architect, was called by the plaintiff as an expert witness. His experience was listed and provided to the Court. He explained to the Court what rising and natural damp entails and referred to certain structural and technical diagrams. He also explained to the court how water content in a wall is measured and the mechanism used by him during his examination of the property. He took the Court through his findings and also confirmed that he had met Mr Fourie, an expert for the defendant, to produce joint minutes in respect of their findings.

[21] Mr Allsop testified that he had visited the property on two occasions, in June 2018 and in February 2019 being in both the dry and wet seasons on the year and took measurements which showed the extent of the damp problems which were recorded in his report. Mr Allsop found that the readings of damp in February 2019 were much increased. He explained to the Court that the defects shown in the pictures depicted in his report of the property in question, were all brought about by the incorrect design and/or construction of the property *ab initio* and that the rising damp and lateral damp is inherent and would have manifested themselves soon after the first year of rains on the home. He expressed the view that the defendants could therefore not say that they had no knowledge of the damp problems. He opined that the defendants may not have known the cause of the damp problems. Such a plea was inconsistent with the evidence found in the house. He indicated in the report that the problems could not have been caused by problems with the roof as the water coming from the roof would run downwards. The marks on the walls indicated rising and lateral damp issues.

[22] In response to a question of the amount being claimed by the plaintiff for the repairs to be effected by Hlayi Trading, Mr Allsop was of the view that the charges were fair in the circumstances, so too were the rates quoted. He did concede in cross-examination that there was a duplication in some of the charges by Advanced Waterproofing which amount could be deducted for the total amount claimed.

[23] Mr Allsop confirmed that he had met with Mr Fourie, the defendants' witness to compile the joint minutes. He brought to the court's attention the fact that Mr Fourie did not open the cupboards to inspect the property nor did he move the furniture around to conduct a proper investigation of the extent of the damp. He only performed a 'visual inspection'. He also did not use a moisture meter in assessing the property. He however pointed out that they agreed that the cause of the damp in the property was as a result of the way the property had been constructed.

[24] The plaintiff closed its case after the evidence of Mr Allsop.

### **The defendants' evidence**

[25] The first defendant gave evidence in his defence of the matter. He testified that the house had been acquired by him in or about 2003 as a completed structure. The condition of the property was perfect and had been what he and his wife had wanted in a home. After purchasing the property, they did not effect any repairs however, in late 2004 after heavy rains, water trickled down the study wall. That was the first encounter with any sort of problem with the house. A roof specialist had been contacted whereupon it was stripped and damp proofed over the parapet walls on the outside. The problem never occurred again. He testified that the guarantee for the said repairs was handed to the plaintiff.

[26] The first defendant further testified that also in 2004 they decided to repaint the outside walls as there had been flaking on the boundary wall. It was suggested by a paint contractor to pressure wash both the boundary wall and the external walls of the house before painting them. This would have the effect of

revealing any defects. A few cracks were repaired and a damp proof substance was painted on the wall prior to the actual painting being effected. The exterior of the property was repainted once more during the defendants' stay and certain areas of the house were upgraded and renovated. This occurred in about 2011/2012 by a "Johannes" who he supplied with the supplies required to paint the walls. Johannes did not perform the same level of painting that was done by the paint contractor. He did not power wash the walls prior to painting them. The first defendant further testified that about a year before he sold the house, he undertook renovations to the entertainment area, the main bedroom and the guest bathroom.

[27] The first defendant testified that on the day of handover of the property, he handed over a file which contained information of the sprinkler system, the manuals for the electronic equipment left in the house, the roof guarantee and paint sample codes.

[28] The first defendant denied that the plaintiff had asked him about problems with the house including waterproofing issues when she came to view the property. He also denied the plaintiff's version that he had received emails pertaining to the damp sent by the plaintiff and that there was bubbling of paint in the main bedroom as described by her. He contends that there was no mould in the cupboards which were also not sunken as alleged by the plaintiff. The first defendant also denied the statements made by Mr Allsop in respect of the misrepresentation and averred that he and the second defendant had carefully looked after the house. He denied that they had deliberately concealed any defects from the plaintiff and also denied any fraud on their part.

[29] Mr Echard Fourie, an expert witness was called on behalf of the defendants. His experience is that of a building inspector having had extensive experience in the building industry. He testified that he only did a visual inspection of the property and did not open any cupboards as he believed that it was disrespectful to do so. He also testified that he did not move furniture around as it was heavy and could have caused damage to the property by its removal. He visited the property in 2020 with Mr Allsop with whom he agreed that there was damp in the property as per the



joint minute of experts but stood by his closing comments which stated as follows:

*"Closing comments*

#### *4.1 Fourie comments*

*I only acknowledge that the meter reading which measures damp deep inside the wall. The meter prongs were used in three areas and in all three the meter showed a flat line indicating no damp. With respect to visual inspection, my statement that the walls were dry is therefore correct."*

[30] In cross-examination Mr Fourie admitted that there was a ubiquitous problem in the construction of the house and must have been there when the defendants resided on the property. He further conceded that his inspection was conducted in July 2018 when there were no rains and therefore less of a manifestation of damp. He noted that there was evidence of previous repair work having been done on the property such as the smoothing over of rough textures. He conceded that had there been no work done on the property from the time the property was bought by the defendants as alleged, the damp issues would look far worse than that captured in the pictures in the Allsop report. He had indicated that the sum of R100 000 would suffice for the repairs but in cross-examination conceded that it had been a thumb-suck and not a quotation for the work to be done to rectify the problems pertaining to damp in the property.

[31] The second defendant did not testify and a medical certificate was furnished on her behalf.

### **Issue**

[32] The issue to be addressed by this Court is whether the defendants were aware of the latent defects in the property purchased by the plaintiff and whether such knowledge of the existence of such defects was concealed by the defendants with the intention to defraud the plaintiff.

## Legal Principles

[33] A purchaser is entitled to institute an action against the seller of a property under the *aedilition* remedies seeking a reduction in the purchase price where the property suffers from a latent defect. A purchaser also has a contractual claim against a seller for damages suffered as a result of a breach of an implied warranty that the goods would be free of defects. This is known as the *actio empti*.<sup>1</sup>

[34] A latent defect is any material imperfection which prevented or hindered the ordinary common use of the property.<sup>2</sup> It can also be described as a fault which could not have been discovered by a reasonably thorough inspection before a sale. It is a defect that only an expert would be able to identify.

[35] The *voetstoots* clause protects the seller against all defects in the property including all latent defects which are unknown to the seller. If the seller was aware of a latent defect and deliberately concealed this from the purchaser, the purchaser will then have a right of recourse against the seller. This principle was reiterated in the case of *Le Roux v Zietsman and Another*<sup>3</sup> where it was held that a seller is deprived of the protection of a *voetstoots* clause in circumstances where the seller perpetrated a fraudulent non-disclosure.

[36] Fraud may arise where the property suffered from an unusual or abnormal quality that the purchaser would have an interest in knowing about and where the seller of the property failed to disclose such unusual feature to the purchaser.

[37] Where a seller is aware of the latent defect but seeks to avoid liability on the basis that he believed the latent defect had been repaired, he must possess an honest belief in the adequacy of the repairs such that the problem had been permanently addressed.<sup>4</sup> Furthermore, one cannot hide behind an estate agent

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<sup>1</sup> *Wilhelm v Henkel South Africa (Pty) Ltd* 1997 JDR 0190 (C)

<sup>2</sup> *Van der Merwe v Meades* 1991(2) SA 1 (A)

<sup>3</sup> (2021) ZALMPPHC 79 {2 November 2021}

<sup>4</sup> *Banda and Another v Van der Spuy and Another* 2013 (4) SA 77 (SCA) at paragraph 21 to 24

who handled the sale to avoid liability. A seller has a duty to disclose a latent defect that he knows about.

[38] Where the non-disclosure affects only the amount of the purchase price that the purchaser would agree to pay for the property, the appropriate measure of the claim would be the reasonable and necessary cost of repairing the defect.<sup>5</sup> What is considered the reasonable cost of repair is not necessarily the lowest of several quotes. Someone who is qualified must be called as a witness to support the reasonableness and necessity of the charges.<sup>6</sup> The expert gives evidence which will assist the court in forming its own opinion as to the correct amount to be awarded to the plaintiff.

### **Evaluation of the Evidence**

[39] When a court is faced with two contradictory and mutually destructive versions, it is obliged to resolve disputes of fact in accordance with the technique as set out in the matter of *Stellenbosch Farmers' Winery Group Limited & Another v Martell et Cie & Others*<sup>7</sup> where the court summarised the technique as follows:

*"To come to a conclusion on the disputed issues, a court must make findings on:*

- (a) The credibility of the various witnesses;*
- (b) Their reliability;*
- (c) The probabilities.*

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<sup>5</sup> Banda (supra) at paragraph 29

<sup>6</sup> Hanos v Barnett 1972 (1) SA 334 (T) at 335G

<sup>7</sup> 2003 (1) SA 11 (SCA) at para 5

*As to (a) the court's findings on the credibility of a particular witness will depend on its impression about the veracity of the witness. That, in turn, will depend on a number of subsidiary factors not necessarily in order of importance such as:*

- (i) The witnesses' candour and demeanour in the witness box;*
- (ii) His bias, latent or patent;*
- (iii) Internal contradictions in his evidence;*
- (iv) External contradictions in what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions;*
- (v) The probability or improbability of particular aspects of his version;*
- (vi) The caliber and cogency of his performance compared to that of other witnesses testified about the same incidents or events.*

*As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)– (ii),(iv) and (v) above, on*

- (i) The opportunity he had to experience or observe the events in question; and*
- (ii) The quality, integrity and independence of his recall thereof.*

*As to (c), this necessitates an analysis and evaluation of a probability or improbability that each parties' version of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in*

*discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised, the probabilities will prevail.,,*

[40] The preference of one or the other version by the court will depend on the outcome of the evaluation of the evidence using the technique as espoused above.

[41] Both parties agreed that the damp was not visible as at the date of transfer of the property. That being so, the defects in and to the property were latent. As it is common cause that the property suffered from a latent defect, the remaining issue to be determined in respect of the merits is whether the defendants had knowledge of the damp problems and wilfully withheld such information.

[42] I will first evaluate the defendant's evidence. I do so bearing in mind Advocate Politis' submission in closing argument that the first defendant was by no means a model witness. The first defendant disputed that the house suffered from latent defects. He refused to concede when questioned in cross-examination that both experts found that the house had an existing damp problem which it had suffered from inception. I am of the view that the defendants must have known about the damp issues in the house. This can be deduced from his evidence-in-chief where he insisted that he had no knowledge of any damp issues other than the very small damp in the main bedroom. He however testified that the paint contractor had stripped every external wall in or about 2004. Mr Fourie, the defendants' expert witness, in cross-examination, agreed that this would have been a very costly exercise which would only be done if there had been a suspicion of damp issues or "map- cracking" to the plaster. I therefore find it implausible that the defendants would have engaged the services of the paint contractor to strip every external wall and apply waterproofing paint to all the walls if there had not been reason to do so such as stated above.

[43] The first defendant was also of the view that the damp problems were

caused by a lack of maintenance on the part of the plaintiff. This view is not supported by any evidence moreover, the first defendant is unqualified to form such an opinion. The experts agreed that there was a damp problem in the house which was present since its construction and which was present during the defendants' ownership of the house.

[44] The first defendant also testified in chief, that he had effected no waterproofing or damp maintenance to the internal and external walls since 2004, 10 years before the property was sold. However, Mr Fourie stated the following in his report:

*"Houses with wall/foundations plastered to ground level will show the damp clearly as paint blisters and plaster cracks develop which is caused by both rising and lateral damp which is common on thousands of houses and as also can be seen by this house."*

Mr Fourie also testified in cross-examination that if the waterproofing or damp maintenance had not been done for a period of 10 years, the house would have looked "very bad" and there would have been clear signs of cracking and bubbling of the walls. Mr Fourie also agreed that if there were no signs of damp when the plaintiff visited the house, prior to purchasing it, this would indicate that recent maintenance had taken place. This evidence by both experts and especially that of Mr Fourie contradicts and belies the evidence of the first respondent of a lack of knowledge of damp in the house.

[45] In response to a question in cross-examination whether he had received an email from the plaintiff about the damp problems, the first defendant denied receiving such emails. When it was brought to his attention that the emails had been sent to an address which he confirmed as his email address, he changed his evidence and acknowledged receipt of such a letter but stated that the letter which was part of the evidence had not been sent by the plaintiff but by her then attorneys of record. In fact, the first defendant's evidence was that the first time he had ever been confronted by the plaintiff with issues pertaining to the damp at the property was when he received summons. His evidence was that

he was "surprised" and "shocked" by the said summons because he and his wife loved the property and took great care in looking after it.

[46] When the first defendant was referred in cross-examination to the plaintiff's request for further particulars wherein information was requested for the preparation for trial, the first defendant replied that he did not refuse to furnish the information but was advised by his attorneys not to hand over such evidence.

[47] Regarding the evidence of the first defendant pertaining to the renovations done in the year that the house was put on sale, he confirmed that they had renovated the guest toilet, the patio and the main bedroom. These were the rooms which Mr Fourie noted in his report did not have any damp. It is not coincidental that no damp was noted in these particular rooms.

[48] The first defendant testified that when the plaintiff first visited the property, he simply followed them around the house and did not engage her at all. He specifically denied that he had been asked by the plaintiff about damp issues in the house or that she had asked that the damp problem in the main bedroom be fixed. It is unbelievable that the owner of a property which is being viewed in his presence would not interact at all with a potential purchaser. The first defendant further contradicted himself by saying that he told her about the roof on the occasion of her first visit to view the house which he later changed and subsequently confirmed had been on another occasion being the occasion when the plaintiff viewed the property with her father.

[49] A witness's credibility must be considered with regard to the wider probabilities as a whole.<sup>8</sup> The proper test is not whether the witness had been truthful or reliable in all features of his evidence but whether on a balance of probabilities he or she is truthful on the essential features of his testimony.<sup>9</sup>

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<sup>8</sup> Medscheme Holdings (Pty) Ltd and another v Bhamjee 2005 (5) SA 339 (SCA) at paragraph 14

<sup>9</sup> Santam Bpk v Biddulph 2004 (5 SA 586 (SCA) at paragraph 10

[50] Looking at the first defendant's testimony as a whole and assessing his credibility as per the Stellenbosch Farmers' Winery case (supra), it is patently clear that he was not a truthful or reliable witness in respect of the essential elements as can be seen from the evaluation above. The first defendant was confrontational, he was aggressive and persistently argued with the plaintiff's counsel in cross-examination. At times could not remember events that occurred some 8 years ago but also asked the court to believe in the definitive nature of his evidence. I am of the view that he is an unreliable witness.

[51] Accordingly, I come to the view that the defendants must have known of the damp issues in the house. The court must then decide whether the defendants had either deliberately failed to disclose the defect or recklessly told the plaintiff a half-truth or knew the facts and failed to reveal them because they did not bother to consider them being of any importance. I do not get the sense that it is the latter. Given the contradictory evidence of the first defendant and the untruths in particular, I am of the view that the defendants deliberately withheld knowledge of the damp issues from the plaintiff. The effects of the damp like the sagging cupboards, the damp smells in the house, the bubbling and cracking paint are all unusual or abnormal qualities that the plaintiff would have had an interest in especially at the time of the purchase of the property. The defendants failed to disclose all of these to the plaintiff. Accordingly, this is a fraudulent non-disclosure on the part of the defendants.

[52] The defendants also pleaded that the property was sold *voetstoots* to the plaintiff and that in the event of any latent defect they are exempted from liability therefrom. As stated above, the *voetstoots* clause protects a seller against latent defects which are unknown to the seller. As it has been found that the latent defects were known to the defendants, they cannot be protected by the *voetstoots* clause in the offer to purchase. The defendants do not plead that they had knowledge of a latent defect and that they believed that it had been repaired. Accordingly, this defence falls to fail.

[53] Mr Allsop's credibility was attacked by counsel for the defendants. It was alleged that he had become "*an advocate for the plaintiff*". This was because he



had formed an opinion that the defendants must have known of the defects and misrepresented the damp issue to the plaintiff. Mr Allsop explained that this opinion was based on the inspection on the house - that any person living in the house for 11 years would have known of the damp.

[54] He was also criticised by counsel for the defendants on his confirmation of the quotations furnished by Advanced Waterproofing and Hlayi Trading. A double claim for work to be done by the two companies had been overlooked by Mr Allsop. This was said to be significant especially in respect of the accuracy of the report and the reliability of his evidence as an expert. Counsel for the defendants was of the view that Mr Allsop used wording in his report that had usurped the function of the Court and that prior to providing his evidence had made up his mind in respect of the outcome of the case.

[55] It is trite that an expert witness is employed to assist the court in deciding issues in which the court does not have the ordinary and requisite expertise. Furthermore, the opinion of an expert witness must be well grounded and reasoned. The determination of the probable value and weight of an expert witness's evidence is not always about credibility; and that judicial officers should be careful not to allow the opinion of an expert witness to take the place of their own finding of fact.

[56] It is noted that Mr Fourie confirmed and agreed in all material respects with Mr Allsop. He expressly confirmed that a person living in the house for a period of 11 years would have seen the evidence of damp in the house. He confirmed that there must have been damp maintenance done on the house in the previous year or so. Although Mr Fourie's report did not specifically state that the defendants must have known about the damp issues in the house, in *viva voce* evidence, he all but confirms that they must have known about such damp.

[57] Mr Allsop explained to the Court that his opinion was based on the facts he had ascertained on his inspection of the property. His findings were corroborated by Mr Fourie. Mr Allsop also confirmed in evidence that there had been a duplication of certain repairs as quoted by Advanced Waterproofing and

Hlayi Trading. I am not convinced that Mr Allsop's evidence is problematic as submitted by Counsel for the defendants. I am in fact satisfied with the evidence, given that it has been corroborated by Mr Fourie.

### **Quantum of the claim**

[58] The plaintiff contends that whether the claim is for a reduction of the purchase price or contractual damages the quantum remains the same - the reasonable cost of repairing the property. Two quotations were obtained for the reasonable cost of repairs from two companies, Advanced Waterproofing and Hlayi Trading, the total amount being the sum of R464 071,77. It was conceded by both the plaintiff and Mr Allsop that there had been a duplication for the replacement of the skirtings and repair of the cupboards. The plaintiff further contends that because the quotes were itemised, it would be a simple task to remove the duplicated item. Accordingly, the sum of R46 284,00 inclusive of VAT can be deducted from the total amount of the quote.

[59] Counsel for the defendants submit that while it is trite law that the purpose of the action in question is to allow the purchaser to reclaim a portion of the purchase price, determining the portion of a price in question is not a straight forward issue. South African courts have deemed the amount recoverable with the *actio minoris* as the difference between the price paid to the seller and "the actual value" of the merx at the time of the sale and not at the time of instituting action or the hearing of the case.<sup>10</sup> Counsel further submits that the costs of actual repairs is not a yardstick often employed by our courts when quantifying a claim in the *actio quanti minoris*. He, however, contends that it is not a practice that is unjust and that if no other method in determining the true value of the defective merx exists, this method would be justified.

[60] Mr Allsop confirmed the extent of the necessary work to be done on the property in order to address the damp issues. In *viva voce* evidence he explained the necessity to replace the skirtings and carpets and conceded the duplication in

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<sup>10</sup> Kerr, *The Law of Sale and Lease*, 3<sup>rd</sup> edition p129

the quotations received from the two companies. He conceded that the correct amount claimed is the sum of R414 787,77. This evidence was not contradicted by Mr Fourie, who in fact conceded in his cross-examination that his estimation of R100 000,00 was merely a thumb-such and not based on any tangible evidence. No quotations were furnished to the court by the defendants for the work to be done in respect of the damp issues.

[61] In his address, counsel for the defendants submitted that the plaintiff is obliged to mitigate her damages. However, mitigation of damages must be expressly alleged and proved by the defendants.<sup>11</sup> The alleged failure to mitigate her damages was never pleaded by the defendants nor was any evidence led regarding what could or should have been done to mitigate such damages. Accordingly, the submission that the damages ought to be mitigated fails.

[62] Accordingly and in view of the defendants not having furnished evidence to the contrary, I am of the view that the sum of R414 787,77 is reasonable in the circumstances.

## **Costs**

[63] The purpose of a costs award is to indemnify a successful party who has incurred expenses in instituting or defending an action.<sup>12</sup> This rule should not be departed from except where there are good grounds for doing so. In determining who the successful party is the court looks to the substance of the judgment and not merely to its form. In the exercise of its discretion the court may attach weight to the moral as opposed to legal obligations of the parties.<sup>13</sup>

[64] The plaintiff had launched an interlocutory application to compel the defendants to answer the plaintiff's request for further particulars. The application was subsequently removed from the roll by agreement between the parties by way of notice with no order as to costs. Counsel for the defendants submits that it

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<sup>11</sup> Desmond Isaacs Agencies (Pty) Limited v Contemporary Displays 1971(3) SA 286 (T) at 290

<sup>12</sup> Rabinowitz v Van Graan 2013 (1) SA 315 (GSJ) at 324E

<sup>13</sup> SA Bus and Taxi Association v Cape of Good Hope Bank 1987 (4) SA 315 (C) at 3231 - 326A

is not clear why the plaintiff did not set such application down for argument if the prejudice suffered by her was as great as suggested when launching the application. Accordingly, the defendants move that the plaintiff's application to compel further particulars in terms of Rule 21 of the Uniform Rules of Court be dismissed with costs on an attorney and client scale.

[65] Counsel for the plaintiff confirmed that such application was not persisted with and that the first defendant's concessions pertaining to the further particulars does in fact confirm that the information should indeed have been furnished. However, he persists with the view that the information requested was necessary and accordingly, all costs should follow the cause.

[66] I have looked at the request for further particulars with the benefit of the evidence having been led and am of the view that the further particulars requested were necessary for the purpose of trial. Accordingly, the order as to costs for the application to compel further particulars in terms of Rule 21 as per the defendants' submission is dismissed.

[67] The plaintiff has proved the quantum of her damages save for the reduction of the duplication referred to above. Accordingly, the following order is granted:

- (i) the defendants shall pay to the plaintiff, jointly and severally, the one paying the other to be absolved, the sum of R417 787,77 plus interest at the rate of 10.25% per annum from the date of summons to the date of final payment;
- (ii) costs of suit.

MOKOSEJ  
Judge of the High Court  
of South Africa, Pretoria

Appearances:

For the Plaintiff:

Adv JM Hoffman

on instructions of

Swartz Weil van der Merwe Greenberg Inc

For the first and second defendants: Adv A Politis

on instructions of:

Synman de Jager Inc Attorneys

Date of Hearing:

9, 10, 11, 12 May 2022

Date of judgment:

5 January 2023