

Onlangse regspraak/Recent case law

Van Nieuwkerk v McCrae **2007 5 SA 21 (W)**

Local authority – building and building plans approval – liability for damages for unlawful building alterations

1 Introduction

Property transactions form an important part of the South African economy and thousands of property sales take place every year. Since the property market accounts for a multi-million Rand industry, the proper control and management of the industry is important to every property owner or future owner. Many laws have been enacted to ensure proper control and management of the property industry. One such law is the National Building Regulations and Building Standards Act (103 of 1977 (“the Act”). The Act came into operation on 1 September 1985 and it introduced a new era in building standards and accompanying building regulations. The main aim of the Act is to provide for the promotion of uniformity in the law relating to the erection of buildings in the areas of jurisdiction of local authorities, the prescribing of building standards and matters connected therewith (see the long title of the Act). Since the enactment of the Act various legal issues have arisen and the courts have been called upon on a regular basis to resolve disputes relating to building plans and building standards. The focus of this case discussion is a further development of the already extensive volume of jurisprudence in this specialised field of local government law combined with the law of things and contract.

2 A Summary of the Facts

The case of *Van Nieuwkerk v McCrae* (2007 5 SA 21 (W)) involves a plaintiff who claimed damages from a defendant caused by an alleged breach of contract, alternatively as a result of the defendant’s alleged fraudulent concealment of certain facts relating to a property transaction whereby the defendant (seller) sold a property to the plaintiff (purchaser). The facts of the matter show that in December 2003 the plaintiff and the defendant entered into a written contract of sale whereby the defendant sold a particular property, together with all improvements thereon, to the plaintiff. The precise details of the agreement between the parties are not necessary for purposes of this discussion, apart from the reference in the agreement to the fact that the property was sold in the condition as it was at the time of the sale and *voetstoots* (22H).

The plaintiff argued that it was an implied, alternatively a tacit term of the contract, that the improvements on the property had been lawfully erected and that building plans and specifications had been drawn, submitted and approved by the applicable local authority in writing as contemplated and required by the Act prior to the erection thereof (23B). The

plaintiff further submitted as being part of the agreement, that the improvements on the property had been erected in compliance with the approved building plans and specifications, and that the plaintiff would be entitled in law to use the property and improvements so purchased to their full extent. After the purchase price was paid the property was transferred to the plaintiff.

According to the agreement between the parties, the improvements on the property consisted of a dwelling house together with certain outbuildings. Unbeknown to the plaintiff at the time of concluding the contract, certain extensions and alterations to the original structure of the dwelling had been erected by the defendant without the prior approval of the local authority who had jurisdiction in the relevant area. The extensions and alterations included a room on top of the garage, a braai area, a servant's room and an indoor garden feature. It was common cause between the parties that prior written approval for such extensions and alterations was required under the Act (note ss 1, 4, and 7 of the Act). The plaintiff furthermore submitted that the additions and alternations did not conform to the requirements set by the Act on various grounds (see pars 23G–J and 24A–D). Based on this particular situation, it was argued by the plaintiff that the use of the extensions and alterations is unlawful and in contravention of regulation 25 which was authorised under the Act (see ss 17 and 20 of the Act). On the basis of the aforementioned, the plaintiff argued that the defendant was in breach of the contract. As an alternative argument, the plaintiff submitted that the defendant knew that the extensions and alterations had been erected by the defendant without prior approval of the local authority, and was therefore in contravention of the Act and regulations issued under the Act (refer to the National Building Regulations as published in GN R2378 in GG 12780 of 1990-10-12). The defendant did not dispute the fact that he had not drawn or submitted building plans, and had not obtained official, legal approval for the mentioned alterations (24F–H).

The plaintiff argued that the facts, and particularly the non-disclosure of the unauthorised alterations, were material to the conclusion of the contract. As a further alternative, it was argued by the plaintiff that the defendant, or alternatively the estate agent acting on the defendant's behalf, fraudulently and with intention to mislead the plaintiff omitted to disclose or concealed the facts of the matter, and in so doing induced the plaintiff to conclude the agreement. If the plaintiff had known about the particular facts, he would not have entered into the contract at the said purchase price and on the agreed conditions. Finally, in consequence of the defendant's alleged fraudulent concealment or omission of the facts, the plaintiff had to legalise the unlawful situation and thus had incurred damages in the form of professional fees, rectification expenses and other costs (25C). The defendant, however, denied that the submissions and terms on which the plaintiff relied were either implied or tacit terms of the agreement and subsequently relied on the fact that the agreement stated that it constitutes the sole and entire agreement between the parties and that no warranties, representations, guarantees or other terms and conditions shall have any force or effect. Because the sale was *voetstoots*, the defendant also argued that the property was sold with all its faults

and that the failure of the defendant to have had the alterations approved was a latent defect; that the defendant had no obligation to disclose such defect to the plaintiff and that his failure to disclose the information was not fraudulent (25F–H).

3 Issues of Law

The court per Goldblatt J held that it was either proved or admitted or not disputed before the court that the defendant had effected the mentioned alterations without the approval of the local authority as required by section 4 of the Act. It was also clear to the court that the defendant knew that he had not obtained the necessary approval for the extensions and alterations on the property, since no plans were drawn up or submitted as required. Finally, it was common cause before the court that the plaintiff had not been informed about the fact that no approved plans existed for the alterations that had been effected on the property (25D–F). The crux of the dispute before the court was thus whether the failure to disclose the unauthorised and unlawful alterations to the property was a latent defect in the contract or not and whether the law held the defendant liable and accountable in the particular circumstances.

The court approached the legal question based on the contractual relationship between the parties. In order for the plaintiff to succeed with his action against the defendant it was necessary to establish whether the reliance of the plaintiff on the fact that the defendant should have disclosed the unauthorised and thus unlawful alterations to the plaintiff fell within the nature of an implied term as recognised under the law of contract. In order to adjudicate this dispute, the court referred to some of the generally known and accepted legal principles and precedents relating to the nature of implied terms and also tacit terms under the South African law of contract (26A–J and 27A–I). Without unnecessary repetition of such authorities, the court stated the following important position (28D–F):

“In my view when a residential property within the area of jurisdiction of a local authority is sold with a building on it the purchaser is entitled to assume that the building has been erected in compliance with all statutory requirements and that it can be used to its full extent. In my view this assumption is so obvious and self-evident that it is not necessary for it to be specifically set out in an agreement of sale and is implied as a matter of law in any agreement of sale relating to such property. However, even if not implied *ex lege* I am satisfied on the facts of this matter that when the parties entered into the agreement of sale it must have been the imputed intention of the parties that the purchaser was buying a property with improvements thereon which could be used in their totality and which had been erected in accordance with s 4 of the Act, and that the purchaser did not run the risk of having to demolish or rectify such buildings in order to comply with the existing law. Accordingly I am satisfied that it was, if not an implied term, a tacit term of the agreement that the alterations had been effected in compliance with the Act.”

The court further agreed with the legal position stated in *Stewart v Appleton Fund Managers* (2000 3 All SA 545 (N)) that terms implied by law in written contracts are as much part of the integrated contract as are the

express terms and are not excluded by a clause stating that the written contract constitutes the sole record of the agreement between the parties (28G–H). The court finally held that the term “*voetstoots*” only excludes liabilities for latent defects of a physical nature in the *merx* but does not apply to the lack of certain qualities or characteristics which the parties have agreed the *merx* should have. Accordingly, the court held that the plaintiff has proved the allegations made in his particulars of claim and that the defendant is liable to pay to the plaintiff such damages as the plaintiff may prove he has suffered as a consequence of the defendant’s actions (29D).

4 Comments and Concluding Remarks

From the outset it is submitted that the court’s decision should be supported and should be recognised as an important development in both the law of contract and in relation to the law relating to the sale of property, building standards and building regulations. In view of the fact that property transactions play an important part in the economy of a state and since the purchase of a property is probably the biggest investment many people will make during their lifetimes, proper control over such transactions is essential. Although purchasers of properties are faced with many constraints and challenges such as title deed conditions, statutory restrictive provisions and general contractual requirements, sellers should not be allowed to conceal defects in the *merx* which could not reasonably have been foreseen by the purchaser. This position is even more applicable in circumstances where a seller conceals facts which are unauthorised and thus unlawful. Under the Act, no person shall, without the prior approval of an applicable local authority, erect any building in respect of which plans and specifications must be drawn and submitted (s 4). It should be noted further that the reference to “building” includes, *inter alia*, any structure, whether of a temporary or permanent nature, any wall, swimming pool or any part of a building (s 1). Owners of properties who conduct alterations or improvements to such properties obviously know whether such improvements are lawful or not and should not be permitted to legally shift accountability to a proposed buyer of their property. This protection is specifically entrenched in the law of contract. Patent defects not disclosed in a contract are for the account of the seller and not the purchaser. (This legal position is supported by leading commentators on the subject. See, eg, Christie *The Law of Contract in South Africa* (5ed) (2006) 159; Van der Merwe *et al Contract: General Principles* (3ed) (2007) 297 and Kerr *The Principles of the Law of Contract* (6ed) (2002) 787. Note also LAWSA (ed Joubert) 24 (1981) pars 54–55.) Whether a defect is latent or patent will depend on the applicable circumstances. It is submitted that unauthorised and, therefore, unlawful alterations or additions to a property effected by the owner of such property should not be defined as latent defects but indeed as patent defects. To burden an unsuspecting purchaser with the unlawful alterations to a specific property will not only be unreasonable and unfair but should also be regarded as being against the general public interest. Apart from the fact that the Constitution of the Republic of South Africa (1996), advocates, *inter alia*, the principle of openness and accountability, many prospective purchasers of properties

do not have easy access to the building plans and approved drawings of the property of a property seller. Such access must be provided by the seller or should be negotiated as a specific term of the contract of sale. Most contracts of sale of fixed property do not, however, allow such access to a prospective purchaser since the parties mostly cannot agree to such access. Property owners mostly want to protect their privacy and the intellectual property rights that rest in the plans and specialised drawings of their property. For this reason, most local authorities will also not provide access to the building plans and site drawings of a property to an apparent prospective purchaser. Access to such information will be provided only with the written permission of the owner. An interesting issue on this point is whether section 32 of the Constitution, read together with the Promotion of Access to Information Act (2 of 2000) can be used to gain access to building plans. In essence, every person, including a prospective purchaser of property, has the right of access to: (a) any information held by the state, including local authorities; and (b) any information that is held by another person and that is required for the exercise or protection of any rights. Although the ambit of this case discussion does not permit an extensive discussion of this issue, it is submitted however that such legal provisions can indeed be employed in order to obtain information regarding the building plans of a particular property. The factual circumstances will however be indicative of the success of such an application or not. One can also argue that to expect of a purchaser to obtain the written permission and then to inspect the building plans and standards before each purchase transaction will not only be very time consuming but will also be unfair and unsound within the law. The onus of lawfully erected buildings and building alterations must fall on the owner of such properties and should not be shifted to a prospective purchaser. The decision in *Van Nieuwkerk v McCrae* is therefore not only correct in law but also a positive step in ensuring that property owners are accountable for their legal responsibilities in relation to building activities and standards on their properties. Estate agents and property owners will be well advised to take serious note of this decision since non-compliance could have serious legal and financial consequences.

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