Customer Dispute Adjudication
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Our reference: C-28329929

Your reference: 23/05-0081992

*Date: 18 August 2023*

**Ombudsman for Banking Services**

Attention: Andre Van Dyk

Per e-mail: Andrevd@obssa.co.za

Dear Sir

**RE: OMBUDSMAN COMPLAINT: MR AC AND MRS LE RADUE // ABSA BANK**

The complaint received from your office on 31 May 2023 refers. Details of the complaint as well as our response thereto are set out below.

**Summary of Complaint**

The complaint relates to Portion 334 Lake Drive, Rosetta, registered in the Pietermaritzburg Deeds Registry as Portion 334 (a portion of Portion 22) of the Farm Spring Vale No. 2170, Registration Division FS, Province of Kwa-Zulu Natal ('**the Property**'). The Property, inclusive of dwelling unit thereon, was purchased from Andre and Avril Schiermeier, under agreement of sale dated 26 September 2021, and financed by way of an Absa Mortgage Loan. The dwelling unit on the Property appears to have been built by the sellers and completed in the last half of 2018.

After taking transfer of ownership of the Property, the complainants were informed by a third party that a large portion of the dwelling unit has been built on the neighboring property, Remaining Extent of Portion 22 of the Farm

Spring Vale No. 2170, Registration Division FS, Province of Kwa-Zulu Natal, not owned by them. The complaint is supported by documentation referencing the neighboring property as ‘Portion 335’, however, the sub-division for portion 335 has not yet been registered in the Pietermaritzburg Deeds Registry.

The complaint includes correspondence between the various impacted parties’ legal representatives, from which it is evident that none of the prior owners of the Property was aware of the existence of ‘Portion 335’ and all are aligned that the property they purchased, owned and on-sold, was in fact the area comprising of both the Property and ‘Portion 335’. While all parties appear amenable to resolving the issue, no agreement could be reached on how the matter should be resolved or who would be accountable to compensate the registered owner of ‘Portion 335’ for the encroachment.

The complainants are aggrieved that Absa did not identify this encroachment when its valuer attended to the physical valuation of the Property, for purposes of security for the mortgage loan. The complainants further allege that, in failing to secure an NHBRC certificate for the dwelling unit, Absa placed its customers at risk of ‘losing their investment’.

Absa is requested to provide the following relief:

- that the registered owner of ‘Portion 335’ be compensated for the entire property, as a result of the encroachment;
- payment of the costs related to the registration of the sub-division for ‘Portion 335’ in the Pietermaritzburg Deeds Registry and simultaneous transfer of ownership of same to the complainant;
- issue of a new mortgage loan agreement, for the same loan amount, reflecting both the Property and ‘Portion 335’ as security for the lending, valued at a minimum amount equal to that for which the Property was originally assessed;
- payment of all and any costs required to secure an NHBRC certificate for the dwelling unit;
- payment of all and any town planner and municipal fees and charges required to secure approved building plans for the dwelling unit; and
- payment of compensation for the time and costs associated with trying to resolve the error.

**Absa Bank’s response**

We have attached the following documents in support of our response to the customer’s complaint:

- Annexure “A” – Mortgage Loan Agreement.
- Annexure “B” – Agreement of sale.

At the outset, we apologize for any distress and inconvenience that the complainants may have suffered which resulted in this complaint being lodged with your office. Having investigated the complaint we respond as follows:-

It is not in dispute that the complainants applied for and obtained a Mortgage Loan from us in November 2021 to finance their purchase of the Property. They signed the attached terms and conditions of the Mortgage Loan Agreement (see annexure A) on 7 December 2021 and, by doing so, agreed to repay the loan amount, together with fees, charges and interest, by making regular payments over an agreed period (324 months), and confirmed that they had read and understood the terms and conditions and agreed to be bound by them.

It is further not in dispute that the complainants were at all times under the impression that the Property was purchased inclusive of the dwelling unit. We confirm that our duly appointed valuer conducted a physical valuation of the Property as part of our assessment process and did not identify that the dwelling unit was encroaching on the neighboring property. This being said, it needs to be mentioned that the sub-division for Portion 335 has not been registered in the Pietermaritzburg Deeds Registry and, as such, is not easily identifiable from public records.

Further to the above and our valuation, we respectfully draw your office's attention to the following clause of the Mortgage Loan Agreement, duly signed by the complainants:-

***12 Property***

***12.1 Our valuation of the Property is solely for us to determine the value of the security for your Mortgage Loan. Our Assessors may not have physically inspected the Property and have not assessed the condition of the Property, structural or otherwise. The valuation is not intended to be an indication of the present or future value of the Property and may not be the same as the purchase price.***

As mortgagee, we provide no warranties regarding the condition of the property, the correctness of the building plans and/or whether the dwelling unit has been built in compliance with the applicable laws and regulations. In this regard, we respectfully draw your office's attention to your office's Consumer Information Note 3 – Home Loans, and in particular the following paragraphs dealing with valuations, which state that:-

> ***"When you apply for a home loan the bank will not necessarily inspect or value the property you wish to purchase. Banks often do so called "desktop" valuations. This means it will base its valuation on information it obtains from various electronic data sources. In these cases it does not physically inspect the property. If a physical valuation is done it does not necessarily check for building defects or any other problems with the property. The purpose of the bank's valuation is purely to assess the property for itself as a credit security risk. The valuation is not in your interests and is not to protect you in any way. You cannot rely on the bank's valuation or assessment. If you want to check that the property is in a good condition you must obtain an independent professional report from an expert. If you want to determine whether the asking price is reasonable you must obtain an independent opinion from an expert in the field. The banks do not provide these services or make any contractual undertaking to you in this regard. As the valuation is purely for the bank's purposes it is not required to provide its valuation to you and you have no right to a copy of it (even though you may have paid for the valuation as part of the initiation costs of the loan application).***

***Banks do not generally check whether buildings which are erected on the property you wish to purchase have been approved by the town council or not. It is in your best interests to check that all improvements to the property have been approved before purchasing the property.***

***Any disputes you may have regarding any defects in the property must be taken up with the seller/developer etc."***

The Property, inclusive of the dwelling unit situate thereon, was sold to the complainants by the sellers in terms of an agreement of sale (see annexure B). While Absa was not a party to this agreement of sale, we respectfully draw your office's attention to the following relevant clauses:-

***10. BEACONS***

***The SELLERS shall not be required to point out the PURCHASERS any pegs, beacons or boundaries upon the PROPERTY and shall not be liable for the costs of location thereof.***

***12. VOETSTOOTS***

***12.1 The PROPERTY is sold by the SELLERS to the PURCHASERS as it stands "VOETSTOOTS" and the SELLERS shall not be liable to the PURCHASERS or any other person for any defects, latent or patent, in the PROPERTY or buildings or improvements thereon or movables, not for any damage and/or loss occasioned to or suffered by the PURCHASERS or any other person by reason of such defects.***

***12.2 The SELLERS shall not:***

***12.2.1 profit by any excess in the extent of the PROPERTY;***

***12.2.2 be answerable or liable to the PURCHASERS or any other person for any deficiency in the extent of the PROPERTY.***

***12.3 The PROPERTY is hereby sold and shall be transferred to the PURCHASERS subject to all conditions of title, servitude and other restrictions as held by the SELLERS; and further subject to such conditions of town planning and/or zoning as may now exist or be imposed by any competent authority.***

The agreement of sale is clear that it was incumbent on the complainants, as the purchasers, to satisfy themselves of the condition of the property prior to signing the agreement of sale. This would include inspecting approved plans, regulatory certifications and property beacons and boundaries. Absa, as mortgagee and financier of the purchase price, cannot be held liable for any claims which may later arise pursuant to the Property or situation of the dwelling unit thereon.

We note the complainant's allegation that, in granting the mortgage loan Absa did not comply with its obligations in terms of the Housing Consumers Protection Measures Act ("the Act") and, in particular, Section 18(1) which provides as follows:-

**Section *18(1)*** ***No financial institution shall lend money to a housing consumer against the security of a mortgage bond registered in respect of a home, with a view to enabling the housing consumer to purchase***

***the home from a home builder, unless that institution is satisfied that the home builder is registered in terms of this Act and that the home is or shall be enrolled with the Council and that the prescribed fees have been or shall be paid**.*

While it could be argued, from the contents of the complaint, that the sellers fall within the definition of 'home builder' as defined in the Act, there are no disclosures in the agreement of sale regarding the age of the dwelling unit or the sellers meeting the requirement of the definition, being ***'an owner builder who has not applied for exemption in terms of section 10A'*.** We further confirm that no disclosures of this nature were made to Absa by the complainants during the home loan application process.

In light of the above, we respectfully submit that the complaint does not relate to the granting of mortgage finance but rather to the purchase and sale of property and, as such, the request for relief should not be lodged against Absa.

**Conclusion**

In consideration of the above information, and whilst we sympathize with the complainants, we retain the view that there was no maladministration or unfair treatment of the complainants on the part of Absa and we are not in agreement with the request, as set out in the application for assistance.

As responsible lender, we are, however, willing to assist our customers, where possible, and will engage the complainants directly to ascertain how we can be of service in supporting them to reach an amicable resolution to the dispute.

Kind regards

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**Johan Brouwer**

**Regulatory Dispute Adjudicator**
**Offices of the Customer Dispute Adjudicator**
**Absa Bank Limited**.