THE INFAMOUS VOETSTOOTS AND ITS APPLICATION TO SALE AGREEMENTS

Voetstoots and the Consumer Protection Act

Since the coming into operation of the Consumer Protection Act 68 of 2008 (CPA), there has been much interest on the position of the infamous voetstoots clause in relation to the CPA.

The general view is that one would no longer be able to include a voetstoots provision in contracts if the transaction falls within the protection of the CPA. A 'transaction' in terms of the CPA refers to agreements concluded in the ordinary course of business by a supplier and a consumer.

For example, a property company in the business of buying and selling property may not include a voetstoots clause in its sale agreements when disposing of such properties. However, where a company, not engaged in the business of buying and selling property chooses to acquire a property for one of its employees for instance, it may nevertheless include a voetstoots clause when disposing of the property, as the disposal is not in the seller’s ordinary course of business.

The reason for the exclusion of voetstoots provisions in contracts which fall within the ambit of the CPA is that voetstoots provisions are considered to be "unfair, unreasonable and unjust" in terms of s48 of the CPA.

Accordingly, it may be argued that selling goods in terms of a general ‘umbrella’ voetstoots clause is a clear waiver and deprivation of a consumer’s right.

In the context of a sale of property, certain suppliers (such as a developer) will no longer escape liability for latent defects (if such supplier is disposing of the property in its ordinary course of business).

It must be pointed out that the CPA does not prevent a supplier from selling goods of a particular condition; however, the condition of such goods must be disclosed (eg a disclosure in a sale agreement which informs the purchaser that the roof may leak from time to time during heavy rains).

Voetstoots in private sale agreements

Generally, a private sale of property is not a transaction which falls within the ambit of the CPA, as the parties are not acting within the ordinary course of their business, and therefore the common law position will prevail in these instances.

There is an obvious advantage to the seller for the inclusion of a voetstoots clause which, in effect, stipulates that the property will be sold ‘as is’. The effect of such a clause is that the seller does not take the risk or responsibility of any defects.

In the common law, there is a presumption against the voetstoots provision, unless expressly included in the sale agreement. A voetstoots provision in a private-sale agreement does not exempt sellers from liability in instances where they misrepresented or were aware of a latent defect in the property and failed to disclose same, as a warranty against latent defects applies automatically by operation of law.

When it comes to a private once-off sale agreement to which the voetstoots clause may apply, it is advisable to insert a

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provision allowing the purchaser to inspect the property (or to have experts inspect the property) as a condition precedent. Such a provision gives the purchaser the option to withdraw or re-negotiate if the inspection report reveals defects. In addition (or alternatively), the purchaser may request that the seller warrants that he is unaware of any latent or patent defects in respect of the property at the time of the sale. Thus, the operation of the voetstoots clause is countered by this type of condition and/or warranty.

Representations by an estate agent

It should be noted that should a seller mandate an estate agent to sell his property, then any representations in respect of the property made by the estate agent will fall under the scope of the CPA. This is due to the fact that the estate agent is acting in their ordinary course of business. Accordingly, an estate agent will not be able to rely on the operation of the voetstoots clause.

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CAN A VOETSTOOTS CLAUSE BE USED IN YOUR AGREEMENT?

Is the sale of the property in the ordinary course of the seller’s business? (E.g. is the seller a developer?)

YES  NO

What is the status of the purchaser / consumer?

NATURAL PERSON/ JURISTIC PERSON WITH AN ANNUAL TURNOVER OF R3 MILLION OR LESS

The CPA will apply. The contract may not contain a voetstoots clause.

JURISTIC PERSON WITH AN ANNUAL TURNOVER OF MORE THAN R3 MILLION

The CPA will apply. The contract may contain a voetstoots clause.

The CPA will not apply. The contract may contain a voetstoots clause.

The common law position will apply. In order to balance this right, a purchaser may protect their interests by inserting a condition precedent of an inspection, or warranty by the seller.
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