

REAL ESTATE

THE INFAMOUS
VOETSTOOTS AND ITS
APPLICATION TO SALE
AGREEMENTS

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Voetstoets 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 voetstoets clause in relation to the CPA.

The general view is that one would no longer be able to include a voetstoets 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 voetstoets 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 voetstoets 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 voetstoets provisions in contracts which fall within the ambit of the CPA is that voetstoets 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' voetstoets 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).

Voetstoets 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 voetstoets 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 voetstoets provision, unless expressly included in the sale agreement. A voetstoets 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 voetstoets clause may apply, it is advisable to insert a

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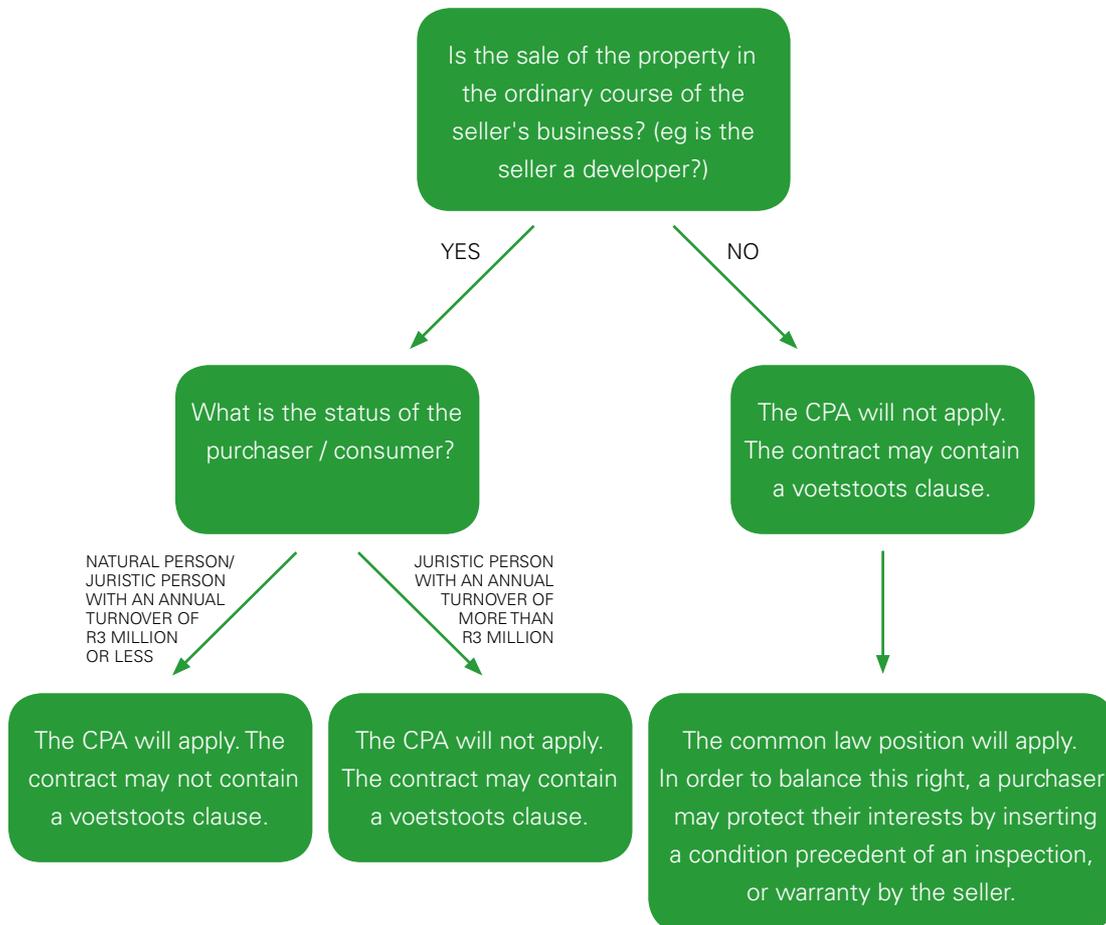
provision allowing the purchaser to inspect the property (or to have experts inspect the property) as a condition precedent. Such a provision gives the purchaser the option to withdraw or re-negotiate if the inspection report reveals defects. In addition (or alternatively), the purchaser may request 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 voetstoets 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 voetstoets clause.

*Written by Samantha Kelly, Associate.
The article was verified by Nayna Parbhoo, Director: Real Estate.*

CAN A VOETSTOOTS CLAUSE BE USED IN YOUR AGREEMENT?



CONTACT US

For more information about our Real Estate practice and services, please contact:



Attie Pretorius
National Practice Head
Director
T +27 (0)11 562 1101
E attie.pretorius@dlacdh.com



Andrew Heiberg
Regional Practice Head
Director
T +27 (0)21 481 6317
E andrew.heiberg@dlacdh.com



Allison Alexander
Director
T +27 (0)21 481 6403
E allison.alexander@dlacdh.com



Mike Collins
Director
T +27 (0)21 481 6401
E mike.collins@dlacdh.com



Lucia Erasmus
Director
T +27 (0)11 562 1082
E lucia.erasmus@dlacdh.com



Simone Franks
Director
T +27 (0)21 670 7462
E simone.franks@dlacdh.com



Daniel Fyfer
Director
T +27 (0)21 405 6084
E daniel.fyfer@dlacdh.com



Muhammad Gattoo
Director
T +27 (0)11 562 1174
E muhammad.gattoo@dlacdh.com



Simone Immelman
Director
T +27 (0)21 405 6078
E simone.immelman@dlacdh.com



Rekha Jaga
Director
T +27 (0)21 481 6382
E rekha.jaga@dlacdh.com



Len Kruger
Director
T +27 (0)11 562 1049
E len.kruger@dlacdh.com



Nayna Parbhoo
Director
T +27 (0)11 562 1701
E nayna.parbhoo@dlacdh.com



Muriel Serfontein
Director
T +27 (0)11 562 1237
E muriel.serfontein@dlacdh.com



Fatima Valli-Gattoo
Director
T +27 (0)11 562 1236
E fatima.gattoo@dlacdh.com



John Webber
Director
T +27 (0)11 562 1444
E john.webber@dlacdh.com



Hugh Jackson
Executive Consultant
T +27 (0)11 562 1088
E hugh.jackson@dlacdh.com



Bronwyn Brown
Senior Associate
T +27 (0)11 562 1235
E bronwyn.brown@dlacdh.com

Samantha Kelly
Associate
T +27 (0)11 562 1160
E samantha.kelly@dlacdh.com

Vicky Meerkotter
Associate
T +27 (0)11 562 1596
E vicky.meerkotter@dlacdh.com

Janke Strydom
Associate
T +27 (0)11 562 1613
E janke.strydom@dlacdh.com

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@dlacdh.com

cliffedekkerhofmeyr.com

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