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REAL ESTATE ALERT

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In with the Consumer Protection Act and out “with a shove of the foot”

Impact of the Consumer Protection Act 68 of 2008 on the voetstoets clause

The Consumer Protection Act (CPA) promotes a fair, accessible and sustainable marketplace for consumer products and services, including the buying or selling of immovable property. The CPA provides for a statutory duty of disclosure. The CPA affects agreements concluded in the ordinary course of business by a developer, who supplies goods (property) to the purchaser of the said property. The result is that such property developer cannot exclude liability for defects in the property by way of a voetstoets clause in their sales agreement.

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In with the Consumer Protection Act and out "with a shove of the foot"

If a seller conceals a defect or fails to disclose a known defect, he cannot hide behind the voetstoots clause.

The common law principle of the voetstoots clause

The **voetstoots clause** is a common law principle and literally means sold "with a shove of the foot". This clause makes it possible to contract out of an implied warranty in an agreement. All contracts have an implied warranty, that the 'thing' sold is sold free from any defects thus the **voetstoots clause** means: what you see is what you get. If a purchaser accepts terms in an agreement, they are accepting the product as is and renounces their right to claim against a seller if a defect is found.

If a seller conceals a defect or fails to disclose a known defect, he cannot hide behind the voetstoots clause. A defect is a flaw that creates an unreasonable risk of harm in its normal use. The difference between a latent and patent defect is - a latent defect is a material defect, which is not visible after reasonable inspection of the property and a patent defect is one that is easily discovered by any person doing a reasonably thorough inspection. In terms of the common law a seller is liable to a purchaser for all latent defects in the property sold for a period of 3 (three) years after the discovery of the defects. If a voetstoots clause is included in a sale agreement, the seller cannot be held liable if the purchaser discovers latent defects on the property unless the purchaser can prove that the seller was aware of the latent defect and failed to disclose this to the purchaser.

In *Odendaal v Ferraris* 2009 (4) SA 313 (SCA) the court held:

'It is trite that if a buyer hopes to avoid the consequences of a voetstoots sale, he must show not only that the seller knew of the latent defect and did not disclose it, but also that he or she deliberately concealed it with the intention to defraud.'

An example of where the seller could successfully rely on a voetstoots provision is in *Haviside v Heydricks and Another* 2014 (1) SA 235 (KZP). In this case, the purchasers of residential property discovered there were no building plans for a garage on the property and consequently the structure was illegal. The court held that the absence of statutory approval such as building plans is a latent defect. However, in this instance, the seller was not aware of the latent defect and successfully relied on the voetstoots clause. This decision reiterates that knowledge of the seller is important as the purchaser must prove that the seller knew about the defect and deliberately concealed it with the intention to defraud.

By contrast, *Ellis and Another v Cilliers NO and Others* 2016 (1) SA 293 (WC), the purchasers successfully relied on the voetstoots provision as they could prove that the seller was aware of a range of defects that she failed to disclose to the Purchaser. These defects included a decaying foundation, support beams and poles and a false ceiling and cement floor, applied over timber flooring, to hide

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subsidence and to create the illusion that the house was level. The court held that even if the seller did not, for example, consider the uneven floors a defect she still has a "parallel obligation" to disclose unusual and abnormal qualities of the property to the purchaser.

The Consumer Protection Act 68 of 2008 has changed the common law insofar as voetstoots provisions are concerned in certain instances.

Impact of the Consumer Protection Act 68 of 2008 on the voetstoots clause

The Consumer Protection Act (CPA) promotes a fair, accessible and sustainable marketplace for consumer products and services, including the buying or selling of immovable property. The CPA provides for a statutory duty of disclosure.

The CPA affects agreements concluded in the ordinary course of business by a developer, who supplies goods (property) to the purchaser of the said property. If a company buys and sells property in the ordinary course of its business, they may not include a voetstoots clause in an agreement of sale when it sells property to a consumer. As a result, a property developer cannot exclude liability for defects in the property by way of a voetstoots clause in their sales agreement. However, if the same developer were to sell his own home, this transaction would not be subject to the CPA as the developer would not be selling this property in the ordinary course of his business. A private sale of property is not a transaction that

falls within the ambit of the CPA as this would not be in the ordinary course of business.

Importantly, not all purchasers benefit from the protection of the CPA. In terms of section 5(2), the Act will not apply to a transaction, if a consumer/purchaser is a juristic person with an asset value or annual turnover exceeding R2,000,000 (two million rand). An agreement of sale between a seller and a purchaser, whose annual turnover exceeds R2,000,000 (two million rand), may include a voetstoots clause as such transaction does not receive protection under the CPA.

CPA provisions that exclude the voetstoots clause from sale agreements

Why should a voetstoots provision be excluded if the CPA affects an agreement of sale? In terms of section 55 of the CPA a purchaser is entitled to receive property that is reasonably suitable for the purpose of which it is generally intended and is of good quality, in good working order and free of any defects. Property must also be usable and durable for a reasonable period of time. The Act provides that a seller should expressly inform a purchaser that the property is sold in a particular condition and the purchaser must expressly agree to accept the property in this condition. Further, the CPA has an implied warranty of quality as well as remedies of repair, replacement and refund. A warranty of quality is implied in every contract but does not mean that full damages are always payable.

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Note that purchasers who are juristic persons with an annual turnover of more than R2,000,000 do not benefit from the CPA.

To summarise, the *voetstoots* clause is a common law principle that stipulates that if a purchaser buys property as is, the purchaser renounces their right to claim against the seller after discovering a defect, save for the instance where a purchaser can show that the seller knew of the latent defect and failed to disclose this to the purchaser. Case law illustrates how courts deal with the *voetstoots* clause in relation to latent defects. However, the CPA gives purchasers the right to goods which are free from any defects and places the purchaser in a more favourable position. The *voetstoots* clause cannot be included in sale agreements where the seller is acting within the course and scope of its ordinary business. Property developers for example, will not be able to rely on the protection of the *voetstoots* clause if it enters into an agreement of sale with a consumer that is protected by the CPA. Conversely, sale agreements between private individuals, that is not within

their ordinary course of their business, may include *voetstoots* provisions in the agreements. Note that purchasers who are juristic persons with an annual turnover of more than R2,000,000 do not benefit from the CPA.

In addition to the obligation to disclose latent defects, the *Ellis* case also confirmed that sellers of property have a parallel obligation to disclose unusual or abnormal qualities of a property to purchasers. We recommend that the seller discloses all defects as an annexure to the agreement of sale when selling property. This annexure should be initialled by the seller and the purchaser. Furthermore, sellers should be aware of when an agreement is subject to the provisions of the CPA and whether a *voetstoots* clause can be incorporated into an agreement of sale. If in doubt always consult your attorney.

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E-learning Offering

Our Employment practice recently launched an e-learning module:
A better place to work

The module will empower your organisation with a greater appreciation and understanding of what constitutes sexual harassment, how to identify it and what to do if it occurs.

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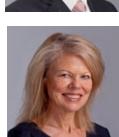


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