

REAL ESTATE ALERT

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Latent defects, patent defects and voetstoots

Have you purchased your dream home, only weeks later to find out that your walls are damp? Perhaps the window was shattered? Or do you now find yourself in a position where you have sold your home and are now required to defend yourself against unwarranted claims for damages from the buyer? The answer is found in the differentiation between what constitutes a latent defect versus a patent one.



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Latent defects, patent defects and voetstoots

Have you purchased your dream home, only weeks later to find out that your walls are damp? Perhaps the window was shattered? Or do you now find yourself in a position where you have sold your home and are now required to defend yourself against unwarranted claims for damages from the buyer? The answer is found in the differentiation between what constitutes a latent defect verses a patent one.

In simple terminology, a patent defect can be seen with the naked eye. When you purchase a property, you will most likely find yourself viewing several homes before you find your dream home. Perhaps, some homes you viewed had a cracked wall or a broken window. This type of defect is characterized as a patent defect as it is clearly visible upon reasonable inspection. As defined in the TheLaw.com law Dictionary and Black's Law Dictionary 2nd Edition, a patent is, *"An obvious flaw that is capable of being seen on the surface with casual inspection."*

Hence, patent defects would include wall cracks, sagging gutters, broken windows and missing tiles, etc. Reference to the defect and who shall be responsible for costs of repair should ideally be made in the offer to purchase. If the defects are recorded, it will create a strong evidentiary basis for the seller to argue that the purchaser was aware of the defects and is thus not entitled to damages based on concealment.

In contrast, a latent defect is one that only an expert would be able to identify. Such a defect would not be apparent to a reasonable person upon inspection of a property. Latent defects to a property may include rising damp, faulty pool pumps or geysers, rusted internal pipes and leaking roofs.

Most sellers are aware of the problems caused by latent defects in a property transaction and that is why they include a clause called the *"voetstoots clause"* in the offer to purchase/sale agreement. *"Voetstoots"*, is described in the Collins Dictionary as *"denoting a sale in which the vendor is freed from all responsibility for the conditions of the goods being sold."* Originating from Afrikaans, the word literally translated means *"as it is."*

The voetstoots clause protects the seller against all defects in the property including all latent defects which are unknown to the seller.

If the seller was aware of a latent defect and deliberately concealed this from the purchaser, the purchaser will then have a right of recourse against the seller. This principle was reiterated in a recent case, namely, *Le Roux v Zietsman and Another (HCA10/2020) [2021] ZALMPPHC 79* (2 November 2021), where it was held that a seller

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is deprived of the protection of a voetstoots clause in circumstances where the seller perpetrated a fraudulent non-disclosure.

Should a defect be identified after the sale of the property is concluded, the onus is on the purchaser to prove that the seller was aware of the defect and that he or she fraudulently/ deliberately concealed this from the purchaser while concluding the transaction. The court will look at objective factors to ascertain whether the seller deliberately concealed the defect (*Roux v Zietsman and Another (HCA10/2020) [2021] ZALMPPHC 79 (2 November 2021)*). If it is found that the seller was in fact fraudulent, he or she may be required to refund part of the purchase price or rectify the defect in question. The reality though is that it is quite onerous on the purchaser to prove that the seller was aware and deliberately concealed this from the purchaser.

Therefore, when a property is being sold, the seller has a duty to reveal to the purchaser any latent defects to the property at the time of concluding and signing the offer to purchase/sale agreement. This is an important step for the seller in order to avoid being held liable for undisclosed defects at a later stage.

The principle of duty to disclose was reiterated yet again in the *Roux v Zietsman and Another (HCA10/2020) [2021] ZALMPPHC 79 (2 November 2021)*. The property was to be used as a guesthouse and the importance of having a well-maintained structure to conduct such a business is a given fact. The fact that there were extensive leakage problems with the roof is material and the seller had a duty to disclose this to the purchaser. Taking into consideration the circumstances in which the seller failed to disclose the true extent of the leakage of the roof and the defects in the roof, the Court came to the

conclusion that the information had been withheld by the seller to secure the sale and to benefit himself.

However, it must also be noted that the buyer also has a duty to fully inspect the property prior to purchasing it and will thus not be able to later claim that he or she was not aware of patent defects.

Before one jumps through all the hoops of negotiating the purchase price, purchasing an existing property and then qualifying for finance, it is imperative for any prospective

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purchaser to thoroughly inspect the property prior to making an offer. Particularly when purchasing in a complex, purchasers are encouraged to speak with other residents, and neighbours in the complex who might be aware of potential drainage or water issues. This inspection should include moving any large items to ensure that the areas obstructed by these are free of defects, e.g., large cabinets should be shifted as they could potentially hide cracks or damp.

The Property Practitioners Act 22 of 2019 will take effect from 1 February 2022, and makes it compulsory for parties to sign a

complete and comprehensive Defects List which will form part of the offer to purchase/sale agreement. This document is then presented to the purchaser so that there is complete transparency between seller and purchaser regarding the condition of the property. You could also utilise the services of a home inspector or an expert to do an assessment of the property to ensure that there are no underlying defects in the property and to ensure that the plans for the property are up to date and in order so that what appears on the property also appears on the plans.

It is important to note that the the absence of statutory permissions (approved building or alteration plans, etc.) are latent defects which are also covered by the voetstoets provision.

FATIMA GATTOO AND FATIMA ESSA

Before one jumps through all the hoops of negotiating the purchase price, purchasing an existing property and then qualifying for finance, it is imperative for any prospective purchaser to thoroughly inspect the property prior to making an offer.



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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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