

## Notes

### Property defects and the *voetstoots* clause in immovable property sales

Disputes arising from defects in immovable property are common in South African conveyancing practice. Central to many of these disputes is the *voetstoots* clause, a contractual provision with deep roots in South African common law. While the clause remains relevant, its effect has been significantly curtailed by consumer protection legislation and regulatory reforms.

#### Purpose of clause

A *voetstoots* clause provides that a property is sold “as is” and that the purchaser accepts it in its existing condition, with all defects present at the time of sale. Its purpose is to protect the seller against claims arising from defects that only become apparent after transfer. Under common law, a *voetstoots* clause generally excludes the seller’s liability for defects, whether patent or latent, provided the seller was unaware of the defect or did not fraudulently conceal it. The clause does not, however, shield a seller who knew of a defect and deliberately failed to disclose it to the purchaser.

#### Defects

A defect is an abnormal quality or condition that substantially impairs the usefulness or effectiveness of the property for its intended purpose. Defects are traditionally divided into patent and latent defects.

Patent defects are those that are reasonably visible or discoverable upon ordinary inspection, such as cracked walls, damaged fittings, or visible damp. Purchasers are expected to identify such defects prior to concluding the sale and generally cannot rely on them to claim relief after transfer.

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Latent defects are hidden defects that are not reasonably discoverable upon inspection and only manifest later. Examples include structural instability, concealed damp, defective foundations, or hidden plumbing or electrical faults. Latent defects are the primary source of *voetstoets*-related disputes.

Absent a *voetstoets* clause, purchasers may rely on common law remedies such as cancellation of the contract in cases of serious defects, reduction of the purchase price (*actio quanti minoris*), or, in limited circumstances, damages.

### Fraudulent non-disclosure

A *voetstoets* clause does not protect a seller who fraudulently conceals a defect. Fraudulent non-disclosure requires proof that the seller knew of the defect, appreciated its materiality, and intentionally failed to disclose it in order to induce the purchaser to enter into the contract.

Silence alone does not automatically amount to fraud. However, where a seller is aware of a latent defect that the purchaser could not reasonably discover and knows that the purchaser is unaware of it, a duty to disclose may arise. The burden of proof rests on the purchaser, and disputes are assessed on a case-by-case basis.

### The Consumer Protection Act

The Consumer Protection Act ('the CPA') has materially affected the operation of *voetstoets* clauses in certain immovable property transactions. The CPA applies to transactions concluded in the ordinary course of business by a supplier with a consumer. Where applicable, section 55 confers on consumers the right to receive goods, including immovable property, that are reasonably suitable for the purpose for which they are generally intended, of good quality, and free from defects.

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In transactions to which the CPA applies, a general or blanket *voetstoots* clause is unlikely to be enforceable. However, section 55(6) permits a consumer to accept goods in a specific condition, provided the consumer has been expressly informed of that condition and has expressly agreed to accept the goods on that basis. This means that while a seller cannot rely on a generic *voetstoots* clause to exclude liability, liability may be limited where specific defects have been fully disclosed and knowingly accepted by the purchaser. The precise scope of this exception continues to develop in case law, and caution is required when relying on it.

The CPA generally does not apply to isolated private sales by individuals who are not selling property in the ordinary course of business. In such cases, the common law position, including the enforceability of *voetstoots* clauses subject to fraudulent non-disclosure, remains applicable. Determining whether the CPA applies is therefore a threshold issue in any dispute involving property defects.

### The Property Practitioners Act

The Property Practitioners Act ('the PPA') introduced enhanced disclosure obligations aimed at improving transparency and consumer protection in property transactions.

Property practitioners are required to ensure that a mandatory disclosure form (Immovable Property Condition Report), completed and signed by the seller, is provided to the purchaser before an offer is made. The form requires disclosure of known defects relating to structural elements, electrical and plumbing systems, roofing, and other aspects of the property. Failure to provide a disclosure form does not automatically invalidate a sale, but the PPA provides that the property is deemed to have been sold with defects disclosed. This may place the seller at a disadvantage in subsequent disputes and exposes the practitioner to disciplinary action and potential liability.

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The disclosure form does not amount to a warranty of the property's condition, but it plays an important evidentiary role in determining whether a defect was known and whether non-disclosure was fraudulent.