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VOETSTOOTS CLAUSES AND THE CONSUMER PROTECTION ACT

In this instalment of our series on the Consumer Protection Act 68, 2008, we examine the provisions of the Act that do away with the seller's right to exclude his liability for defects in the property sold as is usually done by way of a voetstoorts clause.

Part IV

The inclusion of a "voetstoorts" clause in a Deed of Sale for immovable property means that the property is purchased as it stands, together with all defects that it may have. By agreeing to purchase property "voetstoorts", the purchaser effectively exempts the seller from any liability for defects in the property sold or damages caused as a result thereof. However, if the purchaser can prove that the seller had actual knowledge of a latent defect (i.e. one that was not visible at the time of the sale) but failed to disclose it, then the purchaser can hold the seller liable for defects regardless of the "voetstoorts" clause.

In the previous installment of this series, we explained **that the Consumer Protection Act 68, 2008 ('the CPA') only applies to transactions that are concluded in the ordinary course of the supplier's business.** Therefore it would for instance apply to property sold by a developer and to the services provided by estate agents to sellers, but not to once-off transactions between buyers and sellers of property.

VOETSTOOTS EXCLUDED FOR TRANSACTIONS THAT FALL UNDER THE CPA – THE RELEVANT SECTIONS

Section 56(1) of the CPA specifically deals with goods and defects and creates an implied warranty in any transaction that falls within its ambit to the effect that the goods provided comply with consumer's rights to safe and quality goods. Section 56 reads as follows:

"56. Implied warranty of quality

(1) In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be."

Section 55(2) goes on to explain that the consumer is **entitled to receive goods** that:

*"(a) are reasonably **suitable for the purposes** for which they are generally intended;*

*(b) are of **good quality, in good working order and free of any defects;***

(c) will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and

(d) comply with any applicable standards set under the Standards Act, 1993 (Act No. 29 of 1993), or any other public regulation."

Section 55(5)(a) further states that it is **irrelevant whether the defect was latent or patent.**

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EFFECT

In terms of the common law, a seller's liability for defects is one of the natural consequences (**naturalia**) of an agreement, but it may be excluded as it typically is by the inclusion of a voetstoots clause in the agreement.

From a legal technical point of view, sections 55 and 56 of the CPA as quoted above clearly bars the seller from including a voetstoots clause in an agreement by creating an implied warranty on his behalf that the goods are free of latent and patent defects. The conclusion is therefore that the CPA does away with the voetstoots clause and any other contractual stipulation such as a 'no warranties' clause whereby the seller may have sought to limit his liability for defects. in transactions where the Act applies.

(Note, in addition, that section 56(2) then goes on to afford the consumer a right to return the goods within a six month period of delivery of the goods to the consumer. Section 61 (1) introduces no-fault liability for damages that arise as a consequence of any defect of goods. The CPA clearly does not spare the rod to ensure that goods supplied are safe and of good quality and creates substantial risks for the non-compliant!)

At the risk of being repetitive or stating the obvious, in the property law context an ordinary once-off seller like Joe Soap, who does not sell his property in the ordinary course of business, may continue to rely on the protection of the voetstoots clause and have it inserted in his Deed of Sale for the simple reason that such transactions do not fall with the ambit of the CPA. However, developers, speculators, and institutional investors with large property portfolios who sell property in their ordinary course of business, **cannot exclude their liability for defects by way of a voetstoots clause.**