Does a purchaser have rights against a voetstoots clause?

The purpose of a voetstoots clause is to protect the seller from latent defects of which the seller was not aware of at the time of concluding a sale agreement. If the purchaser discovers a latent defect and threatens to cancel the agreement or claim damages, the seller can rely on the voetstoots clause as a defence against the claims. However, if the seller was aware of the defect, and failed to disclose it to the purchaser, the seller will not be able to rely on the voetstoots clause. The principle is simple – the seller should not be liable for damages he/she was not aware of.

This is often where the difficulty lies as the purchaser will bear the onus to proof that the seller was aware of the defect. For example, in *Havidise v Heydricks* a property was sold without valid building plans. The purchaser instituted a claim against the seller, but the court found that the absence of building plans was a latent defect of which the seller was not aware of. Consequently, the seller was able to rely on the voetstoots clause as a defence against the purchaser's claim.

In the case of *Ellis and Another v Cilliers N.O. and Others*, on the other hand, the purchasers bought a property from the sellers. When the purchasers started with renovations, they discovered that the structure was severely decayed. The purchasers instituted a claim against the sellers, and the court found that the sellers knew about the defect and should have disclosed it to the purchasers. Consequently, the sellers were not able to rely on the voetstoots clause, and the purchasers succeeded with their claim.

Recently, in the 2023 decision of *Chuma v Bondcor (Pty) Ltd and others*, the purchaser bought an empty stand with the intention to build a residential property thereon. When the purchaser submitted her building plans to the municipality, she was informed that the property was underlain by dolomite and that a dolomite stability investigation was required before building work could commence. The purchaser later became aware of a geological report which was conducted in 2001 already. The 2001 report provided that the property had a risk of sinkholes and that certain stability measures must first be put in place before the property could be developed.

The purchaser took the seller to court and, amongst others, claimed her purchase price back and offered to return the property. The purchaser testified that had she been aware of the dolomite defect, and the 2001 report, she would not have purchased the property because the purpose of her purchase was to build a residential dwelling.

The seller testified that he saw the report when he purchased the property, but never read it. It was only in 2019 that he became aware of the contents of the report after the transaction had already concluded. The court found the seller to be an evasive witness and said it was improbable that the seller was not aware of the defects regarding the property. Consequently, the court found that the seller fraudulently failed to disclose the latent defect to the seller and could therefore not rely on the voetstoots clause.

This judgement, once again, highlights the principle, that the voetstoots clause only protects the seller if the seller was truly not aware of the latent defect.

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