What is the effect of a “voetstoots clause” in a contract of sale?

It is a rare occurrence in a property transaction dealing with the sale of movable or immovable goods, to find a deed of sale that does not contain a clause which stipulates that the property is being sold or bought on a “voetstoots” basis. The parties to such a sale are then often under the impression that, since the property is being bought “as is”, that the Seller cannot be held liable for any defects which later come to the fore. This view is often a misinterpretation of the law.

In the recent decision of Mkhize v Lourens and another, published during March 2003, the legal position was briefly summarized and it was confirmed that this clause does not afford protection to a seller where he was aware of the existence of certain defects at the time of conclusion of the sale, but did not bring these to the attention of the purchaser, or , even worse, deliberately concealed such defects from the purchaser by, for instance, painting over cracks in the walls. In such a case the seller will be held liable for such defects. The entire transaction may also be cancelled and the status quo ante restored by the court where the purchaser can prove that:

• the object sold had a defect that impaired its utility or effectiveness;
• the defect existed at the time of the sale;
• the seller was aware of the defect;
• the defect was latent and not visible upon inspection;
• the purchaser was unaware of its existence;
• the purchaser would not have purchased the object had he known of the defect;
• he is willing and able to make restitution

It is therefore recommended that the seller of a property, as well as the estate agent who markets the property, should make the purchaser aware of all defects relating to the property and not attempt to conceal any defects in order to avoid problems which may arise later.

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