When will the voetstoots clause save the seller?

There seems to be a general belief that a voetstoots clause in a contract of sale of land will always protect the seller against any claims for latent defects instituted by the purchaser. This is not correct. In the case of Havidise v Heydricks 2014 (1) SA 235 the voetstoots clause did, however, indeed do the trick.

On 15 August 2005 the parties signed a sale agreement for a residential property in Port Shepstone for R896 400. After registration of the transfer of the property the buyer discovered that there was an illegal structure, namely a garage, on it. No plans had been submitted and no approval given for the garage.

The buyers instituted an action for payment of a sum based on the costs of the demolition of the garage and replacing it with a legal one, alternatively the diminished value of the property resulting from the illegal structure. The action was, however, unsuccessful.

The court found that the absence of the statutory authorisation for the garage constituted a latent defect for which the seller would normally be liable. The voetstoots clause, however, protected the seller against such a claim in this case. The court also concluded that the seller was not aware of the defect, i.e. the illegality of the structure, which in fact would have prevented the seller from relying on the voetstoots clause.

What are the lessons?

If you sell a property, make sure that the contract of sale contains a voetstoots clause and that you disclose any specific latent defects that you are aware of in the agreement and exclude liability for them. If you buy a property, you should try to convince the seller to scrap the voetstoots clause, alternatively include a warranty from the seller that there are no illegal structures on the property.

It should also be pointed out that the Consumer Protection Act also nullifies a general voestoots clause where the Act applies, which is for ex. the case where the seller is a property developer.

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