

PROPERTY DEFECTS / VOETSTOOTS CLAUSE

Sellers and Buyers and Estate Agents often approach Conveyancers after a property transfer for advice regarding physical defects in a property. All Deeds of Sale contain a so-called voetstoots clause and there is a lot of confusion regarding its application to such defects. A Conveyancer often goes back to basics and has to explain to a buyer that the house that he has bought, is what it is, and he is not entitled to have it repaired beyond what he has contracted for. In other words, he cannot have or expect a brand-new house. This is essence of the voetstoots clause. Originating in our common law, it is designed to protect the Seller against any claims for damages for a latent or hidden defect. A Buyer can only win such a case if he can prove that the Seller fraudulently intended or withheld something to deceive him into buying the property for the specified price.

Here is an example of a fairly recent case – (Banda vs Van der Spuy). Very briefly: the Seller sold the Buyer a house with a dodgy thatch roof. The Deed of Sale even included a clause providing that the Seller would transfer a recent warranty for repairs to the thatch roof, to the Buyer. Clearly the parties knew that there was something wrong with the roof. The Appeal Court repeated the law on voetstoots which is:

When there is a voetstoots clause, there is a burden on the Buyer to prove not only the existence of latent defect but also that the Seller was aware of the defects and fraudulently failed to inform he Buyer of the existence of the latent defect. That is still the law. Nothing has changed since the famous Van der Merwe vs Meads case in 1991. A Buyer must not only prove that some hidden defect has caused him to suffer damages, he must prove that the Seller knew of it, but that the Seller deceived him fraudulently when buying the property.

In the Banda case, the Court found that the Contractor who had attended to the repairs and which warranty was to be passed on to the Buyer, had advised the Seller that the construction of the thatched roof was utterly inadequate and would continue to leak. On these facts, the Court found that the Seller was fraudulent in concealing this knowledge and thus deceiving the buyer, and the court awarded damages against the Seller for the cost of the repairs and replacement of the defective thatch roof. Justice was obtained by a genuinely deceived Buyer against a dishonest Seller in this case.