

# IN-DEPTH OTP TRAINING

## FINAL SESSION

### VOETSTOOTS:

**Origin – Dutch tradition - To push with one's foot!**

**WHAT YOU SEE IS WHAT YOU GET AND WHAT YOU DON'T SEE... YOU ALSO GET!**

*The purpose of the voetstoots clause is to protect a seller against any claims for damages arising from the discovery of a latent (hidden) defect that was not visible upon a reasonable inspection, by a buyer, at the time of sale.*

#### **NB**

- i. RISK LIES WITH BUYER - He/she must inspect properly.
- ii. Make sure your buyer APPRECIATES this risk!
- iii. The seller does not SELL a property Voetstoots – The purchaser BUYS it that way.
- iv. It is NOT the AGENT's duty to find fault! An agent is only obliged to tell a buyer all he knows or SHOULD reasonably know about the property, **but this is based on what the SELLER discloses in the condition report!**
- v. It is a SELLER's duty to ONLY disclose LATENT/HIDDEN defects which:
  1. are material;
  2. he actually knows of;
  3. which a buyer could not determine upon a reasonable inspection him/herself at the time of viewing; and
  4. which existed at the time of sale.

**It is therefore of critical importance that an agent understands that:**

A buyer must know and appreciate that he/she is OFFERING TO BUY the property voetstoots (it is not the seller who offers to sell it that way).

**This decision will be based on the content of the property condition report and whatever the agent may have told the buyer about the property.**

The seller may assume that the agent has fully discussed the meaning of this clause and its risks, to a buyer.

SO, MAKE SURE that your seller understands that if the condition report says that there are no roof leaks, nor structural problems; no improvements without plans -WHY WOULD THE BUYER LOOK ANY FURTHER?

**HE OFFERS TO BUY VOETSTOOTS BECAUSE OF WHAT THE SELLER SAYS IN THE CONDITION REPORT**

If a Seller intentionally or even negligently makes a misrepresentation in the condition report, VOETSTOOTS may not protect him!

**THE PURPOSE OF THE CONDITION REPORT IS TO PROTECT YOU THE AGENT AGAINST MISREPRESENTATION; AND IT OFFERS THE SELLER TO “COME CLEAN”.**

SO, MAKE SURE YOUR SELLER UNDERSTANDS THE IMPORTANCE OF GIVING HONEST ANSWERS!

IF YOUR BUYER ASKS YOU ANYTHING ABOUT THE PROPERTY WHICH IS NOT CANVASSED BY THE REPORT, GET THE ANSWER IN WRITING FROM THE SELLER. DO NOT GUESS! DO NOT GIVE OPINIONS ABOUT BUILDING LINES; TITLE DEED CONDITIONS; SECOND DWELLINGS etc.

### **When will Voetstoots not protect a Seller?**

If a buyer can prove that the Seller WAS aware of a HIDDEN material defect that the Purchaser could not have detected upon a reasonable inspection himself and which the Seller INTENTIONALLY withheld.

**Voetstoots does NOT APPLY to sales governed by the Consumer Protection Act** – i.e. where the sale arises from the “supply of goods”, then the Act provides a minimum 6-month statutory warranty against defects, **and you CANNOT CONTRACT OUT of this.**

**COC's**

Electric AND electric fence – these are valid for 2 years as from date of issue provided no alterations of any kind have been made. We MAY transfer without one if the Purchaser agrees.

**Electric fence is NOT required with Sectional Title or security estate sales** – the latter applies as long as the fence is on common property and the seller is not legally obliged to maintain it.

Gas – needed for each transfer, may also be waived.

Water By-Law (Schedule 4 under the Municipal By-Law Act) and only if the property falls within the COCT municipal boundary is obligatory for every transfer BUT if the buyer intends to make alterations, this may be waived and then there is a specific form which the BUYER must complete and send to council.

Beetle is NOT legally required and is voluntary or by agreement.

**NON-RESIDENT SELLERS AND WITHHOLDING TAX**

If the seller is a **Non-resident**; and the selling price is **MORE** than R2 000 000, we MUST retain 7.5% (if seller is a private individual); 10% if a foreign company or 15% if a foreign Trust and pay this to SARS to make provision for possible CGT REGARDLESS of whether it is a PRIMARY OR SECONDARY residence.

***MAKE SURE YOUR SELLER IS AWARE – This is legally the BUYER's duty to retain but in practise, the conveyancer's do. If your seller is a non-resident and wants to buy elsewhere using the proceeds he must ESPECIALLY be aware of this!***

The seller can obtain a directive from SARS to reduce or waive this.

**SECTION 29 ALA – PURCHASE PRICE R250 000 OR LESS**

Should the buyer be a PRIVATE INDIVIDUAL where the purchase price is R250 000 or less, he has 5 WORKING DAYS to cancel after his offer was accepted without recourse. FULL STOP.

**HOMEOWNER ASSOCIATIONS and in the case of SECTIONAL TITLE SALES - CONDUCT RULES / LEVIES  
RIGHT OF EXTENSION**

Does the property form part of a Homeowner Association?

If yes BUT **AN HOA DOES NOT EXIST anymore, what now?**

**In CT; either a High Court order or 60% vote by all homeowners who fall within the development.**

**SECTIONAL TITLE**

**Levies: Determine the levies from the Managing Agents and not the Seller!**

**Special Levies** – NB Section 3(3) of the Sectional Title Schemes Management Act, 2011. The Seller will ONLY be liable for such portion of any special levies which is payable up to date of registration of transfer and the Purchaser shall be liable for any part thereof owing as from date of transfer.

**Body Corporate Rules:** Make sure that the Purchaser has read the Rules OR has had access to them! - Pets; number of occupants; noise levels; Air BnB!!! In CT, all SR3 may now be AirBnBd but if it falls in a scheme CHECK THE RULES.

**Section 25 of the Sectional Title Act,** the right to erect and complete a further building or buildings or extensions to existing building/s upon the common property.

**PLANS/SSEG**

**Does your OTP warrant that all plans are in order and/or that the SSEG is installed with the required consent and has a clearance certificate?**

**To answer a question, we get regularly – NO, the agent is NOT required to check and ensure that plans are in place or that the SSEG was installed with council permission etc. This remains the seller's responsibility.**

**Asbestos roofing:**

- Is not a defect

- **Must not be disclosed unless you have a reason to believe that it may be of importance to a buyer**
- **Does not have to be replaced as some articles have suggested**
- **Asbestos is only an “issue” if the property serves as a workplace – THEN the agent should maybe recommend to the seller that an asbestos inspector be approached to assist in order to comply with Asbestos Abatement Regulations.**

## **COMMISSION**

No FFC no commission – as per the PPRA. Attorneys are forced to now call for these.

PPRA now also has a “deeming” provision. In other words, once 30 working days have passed and you have filed a complete application, then you are deemed to be in possession of a valid FFC.

Payable on transfer or cancellation from whatever funds the attorney holds in trust.

Ensure that if you have more than one agency involved, each one’s share is reflected.

**NB - if the selling price is VATABLE then your comm is calculated as follows:**

- 5% (for example) on the NET selling price, plus VAT thereon

Example - if the gross selling price is R2 650 000 then the net price is R2 034 347.82

5% of that = R115 217.39 + 15% (R17 282.61) = R132 500

YOU DON’T CHARGE 5.75% on R2 650 000 as you are then charging VAT on VAT!

## **EFFECTIVE CAUSE WARRANTY**

**Make sure your buyer and seller read this and understand it!** This is NB for effective cause.

If your purchaser says he has seen the property with another agent, you need to try and contact the other agent and cut a deal. The new conduct rules prohibit you from taking

an offer if you know of a previous introduction which MIGHT result on a double commission claim.

## **EXPIRATION**

If the seller fails to accept an offer within the time allowed, this does not invalidate the sale.

In terms of Manna v Lotter (2005 Cape High Court decision) the Purchaser then merely needs to indicate (be it in writing or through conduct) that he still wishes to proceed. Then you may carry on!

This condition is after all for the Purchaser's benefit, and he may therefore waive it provided this is done within a reasonable time after acceptance.

## **AMENDMENTS / ENTIRE CONTRACT**

NB NB NB – ALL terms and conditions for sale of land MUST be in writing and signed.

ANY changes MUST also be signed. **NOTHING ELECTRONIC or digital.**

**Speaker: Robert Krautkrämer**