

# The Voetstoots Clause: What Sellers and Purchasers Should Know

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## COMMON LAW WARRANTY AGAINST LATENT DEFECTS BY SELLER

The common law provides that for a period of 3 years from date of sale the Seller remains liable for any latent defects, unless this warranty is expressly excluded. The use of the 'Voetstoots' is one of the contractual means of excluding this common law latent defect warranty.

## WHAT DOES VOETSTOOTS MEAN?

This term means that property is sold 'as it stands' or 'as is'. The 'voetstoots' clause as it is commonly known, is found in most agreements of sale of immovable property.

## WHO DOES THE VOETSTOOTS CLAUSE PROTECT?

The voetstoots clause is written into the agreement of sale for the protection of the Seller. The protection this clause gives to the Seller is that the Seller is not responsible for any defects which are in the property whether these be latent or patent. The Purchaser buys the property in the condition in which it is found at the date of sale regardless of the condition of the Property.

## WHAT IS A PATENT AND LATENT DEFECT?

A patent defect is one which is obvious and easily seen such as a large and noticeable crack in the wall.

A latent defect is one which is hidden and not easily seen. Examples of latent defects are hidden damp, leaking pools and structural problems which can't be seen with the naked eye.

## WHAT ARE THE SELLER'S RESPONSIBILITIES: THE DUTY TO DISCLOSE

Whilst this clause will protect a Seller, the protection only goes so far. The Seller has the "duty to disclose" any defects which are latent, in other words any defects which are not obvious, but of which he is aware. If the Seller hides defects in the property on purpose, the Seller will not be protected if he acted fraudulently.

In other words, the voetstoots clause will not protect a Seller who knows of a defect in the property but does not tell the Purchaser about the defect or hides the defect. Sellers should also be aware that the law goes even further than a simple failure to tell the Purchaser about a defect in that the voetstoots clause will also not protect a Seller who tells a half truth.

It quoted a judgement from *Odendaal v Ferraris* where Cachalia AJ says:

"where a seller recklessly tells a half truth or knows the facts but does not reveal them because he or she has not bothered to consider their significance this may also amount to fraud."

It is good advice to fix as many of the defects as possible before selling the property. An added advantage of this is that the property becomes more marketable as a result of these efforts.

In summary, the Seller is not protected by the Voetstoots clause if:

- he/she was aware of the latent defect; and
- he/she failed to disclose the defect; and
- he/she failed to disclose the defect with the intention of defrauding the Purchaser.

## WHAT ARE THE PURCHASER'S RESPONSIBILITIES: THE DUTY TO INSPECT

The Purchaser also has certain responsibilities when buying property. This responsibility is the "duty to inspect". The Purchaser must inspect the property and must be aware of the condition of the property as the Purchaser will have to "live" with any defects. If the Purchaser sees defects that are not acceptable, the Purchaser must write into the offer to purchase that the problem be fixed by the Seller prior to registration of transfer. If the Seller accepts the offer to purchase with this condition, that Seller has then agreed to fix the problem.



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