VOETSTOOTS CLAUSES

Defects in a property are often the cause of disputes between buyers and sellers of properties. In the absence of a voetstoots clause in a Sale Agreement, the seller is liable for all latent defects in a property, which result in the buyer not being able to use the property for the purpose it was intended to be used. The insertion in the Sale Agreement of a voetstoots clause protects the seller from liability for latent defects.

Sellers are often under the misapprehension that a voetstoots clause in the Sale Agreement protects them against liability for latent defects in all circumstances. That is not necessarily the case.

In the recent case of Banda v Van Der Spuy [2013] ZASCA 23, the Supreme Court of Appeal (the "SCA") considered whether the conduct of the Sellers invalidated the voetstoots clause in an agreement of the sale.

Mr and Mrs Van der Spuy (the "Sellers") were the sellers of a property, which had a thatched roof. Mr Banda and Ms Fynn (the "Buyers") were the purchasers of the property. Before selling the property, the Sellers had the roof repaired. Despite the repairs, the roof continued to leak. The Buyers sought a reduction in the purchase price by the amount it would cost to repair the roof.

It was apparent that there were two causes of the leak. Firstly, the wooden poles could not support the weight of the roof and had to be reinforced. As a result the roof was gradually collapsing and moving laterally. Secondly, the pitch of the roof was less than it should have been.

The repairs undertaken by the Sellers only dealt with the first issue. The Sellers claimed they had no knowledge of the second issue and were unaware that the repairs had not properly rectified the defect.

The court found that the Sellers had avoided any information dealing with whether the repairs had adequately rectified the defect. The Court found that this avoidance was for the express purpose of not having any doubt thrown upon what they desired and were determined to believe. Furthermore, the Sellers fraudulently led the Buyers to believe that there was a valid guarantee for the repairs to the roof. The guarantee was only for the repairs to the roof structure and did not guarantee that the roof would not leak. In addition, the guarantee had lapsed at the time of the sale.

The Court held that, from the dishonesty of the Sellers in not disclosing to the Buyers that the guarantee had lapsed and was not valid, it was evident that the Sellers were aware the repairs were inadequate and had reasonable grounds to suspect that the leaks in the roof had not been fixed. Accordingly, the Sellers were obliged to disclose this knowledge to the Buyers.

The Court held that, although the Sellers were unaware of the other cause of the leaking roof namely, the inadequate pitch of the roof, by their fraudulent conduct in concealing the existence of the latent defect, they forfeited the protection of the voetstoots clause. Accordingly, the Sellers were ordered to pay to the Buyers the reasonable cost of repairing the roof.

Robin Westley
Partner

assisted by
Carol McDonald
Professional Assistant

Cox Yeats Attorneys
Umhlanga Ridge

If you require assistance or advice regarding property matters, our specialist property team can advise you. Contact us on 031-5638500 or email rgreen@coxyeats.co.za, rwestley@coxyeats.co.za or cmcdonald@coxyeats.co.za