

VOETSTOOTS - DOES SILENCE CONSTITUTE FRAUD?

A contract to buy or sell property would invariably include a voetstoots clause. The recent Court decision of Waller and Another vs Pienaar and Another 2004(6) SA 303(C) has elucidated certain aspects of the voetstoots clause.

What is meant by the term "voetstoots"?

The clause means that the property is sold "as is" or "as it stands". Accordingly the purchaser purchases the property with all the patent and latent defects. Simply put patent defects refer to defects that are visible to the naked eye and don't require expert inspection, whereas latent defects refer to defects that one would not normally discover with a normal inspection e.g. a leaking roof. The purchaser is always liable for patent defects unless the contract provides otherwise.

Van der Merwe vs Meads 1991 (2) SA 1(A)

The case of Van der Merwe vs Meads is the leading authority in respect of the "voetstoots" clause. The case sets out the main criteria when analyzing the Seller's liability in respect of property sold voetstoots and states that a Seller is deprived of protection under the said clause in the following circumstances:-

- a) Where the Seller was aware of the defects in the property when entering into the contract; and
- b) The Seller (*dolo malo*) intentionally conceals the existence of the defect with the intention of defrauding the Purchaser.

Clearly, the test in Van Der Merwe vs Meads placed a difficult burden of proof on the Purchaser as the Purchaser would have to prove that the Seller had knowledge of the defect together with the intention to defraud the Purchaser to succeed in depriving the Seller of his defence under the voetstoots clause. In the past, the second leg of this intention to defraud test was often easily negated by the Seller.

Waller and Another vs Pienaar and Another (6) SA 303C

The recent case of Waller and Another vs Pienaar and Another deals with the second leg of the test. Whilst upholding the principals laid down in the Van der Merwe vs Meads, the Cape Town High Court in this case has now elucidated the principles and this case will assist Purchasers in the future.

The case in question arose from allegations by the Purchasers that the property in question had latent defects which the Sellers failed to disclose to them at the time of the sale. The court analyzed whether the Sellers could rely on the voetstoots clause as a

defence and what the Purchasers would have to prove in order to succeed. The alleged defects were poorly compacted filling, a vertical crack at the north gable wall, settlement of entrances screen wall, poor quality of external face brick panels, the failure of internal walls and the dwelling had been constructed above an uncontrolled fill site which fill site was of such a nature that necessary steps had to be taken to provide adequate footings and suitable founding depths to avoid any construction on the property from cracking and this had not been done with the building in question.

The Court held that in order for the Purchasers to be successful in their claim they had to prove that:-

1. The defects were latent;
2. The Sellers were aware of the defects at the time of sale;
3. The Sellers had a duty to disclose the existence of the defects to the Purchasers at the time of sale;
4. The Sellers fraudulently concealed the existence of the defects, thereby inducing the contract, alternatively the Sellers fraudulently misrepresented that there were no defects.

Were the defects as pleaded latent?

The court summed up the definition of latent defects to mean not “apparent” or a defect that is not reasonable capable of perception. The court held that the defects were in fact latent especially because the defects would not be visible to the untrained eye. The Sellers had argued that the crack to the north gable wall was “visible” and therefore not “latent”. The court took into account that the property was inspected at night time and held that the Purchasers would not have seen same and since the Sellers did not disclose this to the Purchasers they could not reasonably be expected to be aware of same, thus qualifying the defect as latent.

Were the Sellers aware of the alleged defects at the time of the sale and if so were they under a duty to disclose these to the Plaintiff?

In answering this question the Court reviewed the case of *Knight vs Trollip*:-

"I think it resolves itself to this, viz that here the seller could be held liable only in respect of defects of which he knew at the time of the making of the contract, being defects of which the purchaser did not then know. In respect of those defects, the seller may be held liable where he has designedly concealed their existence from the purchaser, or where he has craftily refrained from informing the purchaser of their existence. In such circumstances, his liability is contingent on his having behaved in a way which amounts to a fraud on the purchaser, and it would thus seem to follow that, in order that the purchaser may make him liable for such defects, the purchaser must

show directly or by inference, that the seller actually knew. In general, ignorance due to mere negligence or ineptitude is not, in such a case equivalent to fraud."

The Sellers were clearly aware of the defects as they admitted to knowing that the north gable wall was cracked and also admitted that extensive work had to be done to cover up cracks on the internal walls. The Court further quoted from the case of Forsdicks vs Young where the learned Judge stated that:-

"the words "designedly" and "craftily" imply that there must be some element of the transaction beyond mere knowledge and non-disclosure. The learned Judge further states that it may be that the Seller's awareness of the Purchaser's ignorance would supply that element."

The Court pointed out that the Purchaser asked no question regarding certain of the defects and had to have purchased the property ignorant of the same.

Did the Sellers fraudulently conceal the defects and/or falsely misrepresent to the Purchasers that there was no defects with the intention of inducing them to buy the property under the circumstances where the Sellers had a duty to disclose the alleged defects.

The Court when answering this question ultimately decided that "silence in this instance" arising from the Sellers' knowledge of the facts and the deliberate decision not to reveal them, was clearly fraudulent. Accordingly the answer to this question was in the affirmative.

The Court concluded that the contract was to be cancelled and the Purchasers were to be placed in the same position they were prior to entering into the sale.

Clearly under certain circumstances silence on the part of the Sellers will be tantamount to fraud and this will assist a Purchaser in succeeding in a claim and deprive the Seller of his defence that the property was sold *voetstoots*. In light of the above it is evident that the Court will not come to the assistance of a "dishonest" Seller.



Going Beyond

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