With many property transactions, what you see, may not always be what you get. It is not uncommon for a purchaser to buy immovable property only to find out that after the sale (usually after registration), there are many defects in the property.

The common law principle of voetstoots is that: if parties to a sale agreement state or contract that the property is sold “as is”, with all hidden (LATENT) and obvious (PATENT) defects, then the buyer needs to accept the property in that condition and cannot demand defects to be fixed. HOWEVER, if the seller knew of latent defects and didn’t disclose them, he/she cannot hide behind this clause.

With patent defects, it is assumed that you should have seen it when you thoroughly inspected the property so there is no recourse.

Some members of the public believe that one can no longer sell a property voetstoots. This is a misconception and this could be why:

1. In terms of the new Property Practitioners Act, 2022, a Property Practitioner must provide the purchaser with a mandatory disclosure form (completed and signed by the seller prior to them making an offer). A disclosure form requires a seller to disclose all latent (hidden) defects of which he/she was aware.

This form does not necessarily mean that the purchaser is exempt from thoroughly inspecting the property as the seller may not be aware of some of the existing defects. If a seller was not aware of same (and the burden of proof would be on the purchaser), then the purchaser cannot hold the seller liable and he (the seller) may rely on the voetstoots clause. It is not a blanket legal requirement that in all transactions, a seller has to provide a disclosure form (the onus is merely on a real estate agent to arrange this when they are involved in the transaction). The sale agreements may still have the voetstoots clause therein.

2. In terms of the Consumer Protection Act, a person acting in the ordinary course of their business (e.g. a developer) may not sell their new product voetstoots. The snags would need to be attended to and there would be certain warranties in place for various aspects of the

> property and workmanship. The general public seem to think that this legislation applies to all property transactions which is not the case and thus the notion that one cannot sell a property (second hand) voetstoots is incorrect.

That being said, our advice is to please ensure, as a seller, that you disclose whatever defects are within your knowledge (most especially latent defects) and as a buyer, you thoroughly inspect the property to avoid disappointment and possibly litigation.

If you have any queries please don’t hesitate to contact us.

Author: Kaylean Adimoolum-Sunny