Voetstoets

Time and time again we experience issues regarding defects where a dispute arises about the state of a property and whether a defect was old or new.

For the sake of clarity, when a voestoots clause appears in an Agreement of Sale and Purchase, the property is sold in the condition that is in, with both latent (hidden) and patent (obvious) defects.

A Seller may rely on this clause unless there are some hidden defects which he/she is aware of but failed to disclose in the Sale Agreement. Patent defects do not have to be pointed out as a Buyer warrants that he/she has inspected the property and there is an assumption that if one looked around, one would see the defect so there is no need to point it out.

Often clients believe that due to the Consumer Protection Act, one cannot sell a property voetstoots. In light of the fact that most Sellers are not selling in the ordinary course of their business, the Consumer Protection Act does not apply to the sale of their property. This means that the voetstoots clause may still be included in an Agreement of Sale and Purchase.

What does fall under the voetstoots clause however is the service agreement between the Seller and the Agent. In order to protect themselves most agencies obtain a declaration from the Seller as to the state of the property. Whilst this helps to clarify issues to some degree, it is still vitally important for the agent to inspect the property themselves and even to keep photographs thereof. Having evidence of the property or even just being familiar with the property would mean that when a Purchaser tries to claim that a defect is a new defect and therefore does not fall under the voetstoots clause there will be evidence to either confirm or deny this fact.

In most cases, it appears as though Sellers are very nonchalant when signing the declaration and this alone should not be relied on.

- Taps, hot water, water pressure – please either check these or put a clause to say they are in working order.
- Aircons & fans (incl remotes) – please put a clause that they are in working order otherwise make the Buyer actually turn it on.
- Geysers – the electrical company doesn’t check that it works, they only check the connection. The same for an oven, etc. Please put in a clause that warrants they are in working order.