



fn inc

Attorneys Notaries Conveyancers

1st Floor, 2 Albury Park, Albury Road, Dunkeld West, 2196. Docex 11 Hyde Park. t +27 11 560 7100 f +27 11 759 7960

HELP, MY NEW HOME HAS DEFECTS

1. It is quite common for buyers to discover defects in the property they purchased after they take occupation and then to complain of these defects which they were unaware of at the time of viewing the home and which was not disclosed to them by the seller/s
 2. There is no duty on a seller to disclose defects in a property they sell voetstoots. Voetstoots is a legal principle of Dutch origin that applies equally in our law that literally means by the shove of a foot, in the condition as is.
 3. In fact the voetstoots provision serves to place the purchaser on notice, that he buys the property with all latent (not immediately visible) and patent (obvious and visible) defects.
 4. All homes in South Africa are sold with the agreement of sale containing a voetstoots provision. The impact of this provision is that the sale thus concluded is done without any warranties and guarantees regarding any matter pertaining to the property and that the purchaser is placed on notice that they must thoroughly inspect the property prior to making an offer and even get a home inspection concluded (as is also suggested in the standard property condition report now required as part of a sale in terms of the Property Practitioners Act) by a professional at their expense if they wish to. If the inspection reveals any matters that prospective purchaser is dissatisfied with it will be opportune to negotiate warranties, guarantees or provisions into the offer, making the seller liable therefore and the seller is then at liberty to accept, re-negotiate or reject the offer.
 5. There is no duty on a seller to make promises or warranties to offerors regarding the property. In terms of the Property Practitioners Act there is a duty on a seller to complete the prescribed Property Condition Report, but as is clear from a closer inspection of the prescribed Report, the subjective statements the seller makes about the property is made in good faith and is not be regarded as a warranty or guarantee regarding the condition of the property and furthermore the prescribed Report cautions the offeree to have an independent assessment of the property conducted should they consider it necessary.
 6. There are only two exceptions to the voetstoots provision in terms whereof a buyer buys a property with all its latent and patent defects:
 - 6.1 Where the buyer successfully negotiates warranties about the condition of a particular aspect of the property into the sale agreement, he can insist on rectification by the seller in respect of that matter should it not be in line with the warranty
 - 6.2 Where the buyer successfully proves in court on a balance of probabilities that the Seller intentionally defrauded the buyer about any aspect of the property
 7. As regards paragraph 6.2 above, our law comes to the aid of buyers that were intentionally defrauded by a seller. Our law provides that sellers who actively and intentionally defraud buyers regarding the condition of the property and thereby induce a sale, will not be able to escape liability for the fraud they committed. Mere knowledge of a defect on the part of a seller is not adequate to succeed in a claim against a seller. Intent to defraud is an essential component to succeed with a claim against a seller. Fraud will not lightly be inferred in a civil trial. In this regard, please see landmark case of - [Odendaal v Ferraris \(422/07\) \[2008\]](#)
-

8. The prescribed Report can be used by a purchaser to pursue a case of fraud, provided the purchaser can on a balance of probabilities prove to a court that the seller acted fraudulently, like for example concealing the defect in the property. Interesting to note on this point that in the abovementioned Supreme Court of Appeal Case (highest court in South Africa bar the Constitutional Court) the purchaser lead evidence to demonstrate that the outbuilding on the property bought had severely damaged roof trusses and that when they viewed the property with the agent, the agent informed the buyer that he did not have a key for the outbuilding so the buyer stated that this defect was therefore concealed. The learned Judge of the Supreme Court of Appeal stated that nothing compelled the buyer to make an offer prior to having viewed the outbuilding and nothing prevented the buyer from making the offer conditional upon having had sight thereof, but to go ahead and make an offer before having satisfied themselves in this regard results in the buyers assuming that risk.
9. Therefore, fraud will not be assumed just because the seller made a statement in the prescribed Report that is incongruous with factual findings. The purchaser will have to persuade a court that the Seller acted with malice or intent to defraud. A seller who was ill-informed about the state of his property and did not actively perpetuate fraud will not entitle an aggrieved purchaser to any relief.
10. There are instances over the last number of years where the courts have assisted aggrieved purchasers, and the circumstances always crystallise down to the same elements. The courts will override the all-encompassing protection afforded to the seller by the *voetstoots* clause only to the extent that the seller acted honestly. The burden of proof however is that of the purchaser.

In Maloka v Vermeulen, the Gauteng High Court ruled that the sellers could not rely on the *voetstoots* clause because they acted fraudulently by concealing extensive latent damp issues. The buyer (Maloka) discovered significant, severe damp in the walls and ceilings of the home shortly after taking transfer. The sellers had recently redecorated and painted over the affected areas, which masked the defect from a normal, reasonable inspection. The court found that the sellers were aware of the damp and had failed to disclose it, which constituted "fraudulent non-disclosure" and the sellers were ordered to pay the buyer R414,787.77 in damages for repair costs.

The key legal principle is that a *voetstoots* clause only protects a seller for latent defects they were truly unaware of. It does not protect a seller who knows about a latent defect and deliberately conceals it. To succeed, the buyer must prove the seller knew of the defect, failed to disclose it, and deliberately concealed it to induce the sale.

Another similar, often-cited matter where the seller was held liable for hiding damp is Van der Merwe v Moolman and Others (unreported case, 2021), where the court held that concealing damp with paint constitutes fraud. Here Mr and Mrs G sold their property pursuant to their divorce. Mrs G testified that she retained several contractors including Limbika Coatings and Painters to "beautify" the property so that it could be marketed as favourably as possible. Evidence showed that extensive cosmetic repairs had been undertaken to the very areas that were established to be damp, which clearly showed intent to actively conceal the damp.

Furthermore, both sellers were signatories to the Property Condition Disclosure form attached to the Sale Agreement in terms of which no latent defects in the property were recorded, despite Mr G being aware of the damp smell and bubbling. The magistrate's court found that Mrs G had known of the damp and had knowingly concealed it during the sale process. Importantly, the damp qualified as a defect, as it affected the use and value of the property, and such defect was latent, rather than patent, as it was hidden and not obvious to an untrained eye when viewing the property.

11. We trust this information will aid buyers in assessing their position and enable them to make sound decisions about how or whether to move forward with their complaints

*Although care has been taken to ensure the accuracy of the above information, FNINC and its members, employees, agents and representatives cannot be held liable for any loss suffered, as a result of the use of this information.
Updated January 2025*