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VOETSTOOTS AND UNAPPROVED BUILDINGS PLANS

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REAL ESTATE

VOETSTOOTS AND UNAPPROVED BUILDING PLANS

Until quite recently, there existed some uncertainty as to whether the absence of statutory permissions, for example the failure to obtain statutory approval for the construction of a carport or outbuilding, constitutes a latent defect (that is, a defect which is not visible or discoverable upon an inspection of the property) within the scope of the *voetstoots* clause, or whether the *voetstoots* clause protects sellers only against defects of a physical nature.

In the matter of *Odendaal v Ferraris (2009) (4) SA 313 (SCA)*, the court was called upon to decide this point. The facts, briefly stated, were the following: the purchaser of certain immovable property discovered that the carport and outbuilding had not been erected in accordance with approved building plans, and therefore did not comply with s4 of the National Building Regulations and Building Standards Act, No 103 of 1977 (Act). Consequently, the purchaser instructed his bank not to proceed with the transfer and bond registration which conduct the seller regarded as a repudiation of the sale agreement entitling the seller to cancel the agreement. The seller duly cancelled the sale agreement and instituted eviction proceedings against the purchaser who had taken occupation of the property. The purchaser resisted the eviction proceedings on the ground that the property was latently defective and as a result he was not in breach of contract. The seller's response was that the *voetstoots* clause in the sale agreement protected her against a claim by the purchaser based on the lack of the said statutory authorisations.

The court held that the absence of statutory approval (in this instance the failure to obtain approved building plans) constitutes a latent defect which interferes with the ordinary use of the property, and the fact that the carport and the outbuilding also contravene building regulations does not change their characterisation as a latent defect. Accordingly, as held by the court, a *voetstoots* clause ordinarily covers the absence of statutory authorisations and protects the seller against claims based on such latent defects.

More recently in the matter of *Haviside v Heydricks and Another (2014) (1) SA 235 (KZP)*, the Kwazulu-Natal High Court was faced with a similar question. A double garage erected on the property constituted an illegal structure as there were no building plans approved by the municipality for the garage nor did it meet the required standards in terms of building regulations. The court confirmed the principle established in *Odendaal v Ferraris* that the absence of statutory approval constitutes a latent defect which is ordinarily covered by the *voetstoots* clause.

It is important to appreciate that a *voetstoots* clause does not provide absolute protection to a seller seeking to avoid liability for latent defects. It is trite that if a purchaser wishes to avoid the consequences of a *voetstoots* sale, the onus is on him to show on a balance of probabilities the following:

- that the seller was aware of the defect at the time of making the contract
- that the seller failed to disclose the existence of the latent defect
- that the seller deliberately concealed the defect with the intention to defraud

Notably, case law has shown that in the context of a *voetstoots* sale, purchasers find it difficult to prove the above requirements for a successful claim in respect of latent defects. The evidence of a suitably qualified expert is often required to draw an inference that the seller was aware of the latent defect and deliberately concealed the defect with the intention to defraud the purchaser. In many instances purchasers to their peril have neglected to plead and prove the element of fraud, relying solely on the seller's apparent knowledge and failure to disclose.

Purchasers should take heed of the judgments referred to above and the potential disastrous consequences of purchasing a property containing illegal structures. Where illegal structures exist, the municipality could apply for a demolition order, which if granted will result in the illegal structures being reduced to rubble with the attendant reduction in value of the property concerned.

A prospective purchaser can either satisfy himself prior to entering into a sale agreement that the improvements on the property are built in accordance with approved plans and according to municipal regulations (often with the help of a qualified expert eg an architect), or insert an appropriate warranty by the seller to this effect. Another option is to delete or omit the *voetstoots* clause in its entirety. Where time does not permit a proper investigation before signing the agreement, a suitably worded suspensive condition providing the purchaser with a period of time within which to satisfy himself as to the legality of the improvements and to notify the seller in writing of his satisfaction could be inserted into the agreement. Ideally, the seller should be obliged to furnish the purchaser with a copy of the approved plans as soon as possible after signing the sale agreement. If the purchaser neglects to ascertain the status of the improvements prior to transfer, he will either have to accept the property with the prevailing defect or enter into costly (and often protracted) litigation in an attempt to enforce his rights.

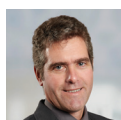
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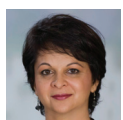
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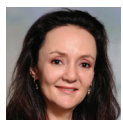
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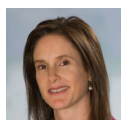
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