

# Despite voetstoots clause, contracts can be cancelled

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Contracting out of liability for patent and latent defects is commonly described as a voetstoots clause and is often contained in contracts. A voetstoots clause provides a seller with a defence against a claim that a buyer may bring based on the discovery of a latent defect. It does not provide a defence where the seller acts fraudulently.



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Courts have interpreted a 'defect' as something substantially impairing the use or effectiveness of the asset purchased. Most of the case law involves latent defects. A 'latent' defect is one which is not visible or discoverable upon inspection. Where this is uncovered subsequently, a buyer may be entitled to cancel the sale and claim repayment of the purchase price and interest or to claim a reduction of the purchase price, depending on the nature and extent of the defect.

The courts have interpreted 'fraudulent' in this context to include instances where the seller was aware of the latent defect and deliberately concealed it from the buyer, despite having a duty to disclose it.

The recent case of *Ellis v Cilliers* reaffirmed the courts' approach to latent defects where a contract of sale included a voetstoots clause. A buyer purchased a property and subsequently discovered that the floors were uneven. The court held that this amounted to a latent defect in that the seller, by laying cement screed over the wooden floors and covering them with carpets and tiles, had deliberately concealed the unevenness.

As the contract of sale included a voetstoets clause, the presence of fraudulent conduct was necessary for the seller to be held liable by the court. The court found that the seller had known of the uneven flooring and had acted fraudulently by taking steps to conceal the existence of the defect. Accordingly, the purchaser was entitled to such relief, as could be proven, plus legal costs.

While purchasers enjoy legal protection against latent defects, there is no substitute for due diligence at the time of purchase. Sellers should be aware that they will be held accountable, notwithstanding any voetstoets clause, should they embark on conduct designed to mislead an unsuspecting purchaser. With greater emphasis on consumer protection than previously, this judgment reinforces that the courts are correctly taking a strong approach to this issue.

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